United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-2073

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-2073
(76-2085)

MILTON SILVERMAN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from Orders of the United States District Court for the Southern District of New York, Palmieri, J., Denying a 28 U.S.C. Sec. 2255 Petition To Set Aside Petitioner's Prior Conviction in that Court and Denying a Motion (F.R.Civ.P, Rule 60(b)) to Correct and Set Aside that Order.

JOINT APPENDIX

Lloyd A. Hale
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36 West 44th Street
New York, New York 10036

UNITED STATES COURT OF APPEALS
FILED
MAR 2 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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PLAINTIFFS | DEFENDANTS | PALMIERI J.

SILVERMAN, MILTON | UNITEDSTATES OF AMERICA

FILED: 7/30/75

CAUSE

Application to se aside judgment in 68 Cr. 762

MW

ATTORNEYS

Milton Silverman
36 West 44th Street
New York, N.Y. 10036
972-0170

498 v. USA

A

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'75 Civ. 4701

DATE	NR.	PROCEEDINGS
10-08-75	2	Filed Petition and motion to vacate sentence.
10-03-75	2	Filed Notice of Petition and Motion to set aside the judgment of conviction entered in 68 CR 762, pursuant to Title 28, Sec.2255 U.S.C. Ret.10-16-75.
1-30-76	3	Filed affdvt.of A.Maloney in opposition to motion to vacate.
1-30-76	4	Filed Govt's memorandum of law in opposition to motion to vacate.
3-9-76	5	Filed reply affdvt. of L.A.Hale in reply to respondent.
05-07-7	—	Filed memo endorsed on document # 1. Motion denied in all respects. See opinion dated 5-5-76 filed herewith. PALMIERI, J.
05-07-76	(6)	Filed Opinion # 44362— for the reasons stated— petitioner's motion pursuant to 28 U.S.C. sub. 2255 to vacate a judgment of convinction is denied in all respects. It is so ordered. PALMIERI, J. (m/n)
06-08-76	(7)	Filed Petitioner's Affidavit and Notice of Motion for an order to vacate the opinion & order of Hon.Palmieri filed 5-7-76. (also entered in 68 CR 762)ELP.
6-23-76	8	Filed Govts reply memorandum in opposition to motion to vacate opinion.
07-01-76	9	Filed Petitioner's Reply Affidavit to respondent's memorandum in opposition to petitioner's pending motion for inter alia vacation of this Court's opinion and order of May 7th, 1976.
07-02-76	(10)	Filed petitioner Milton Silverman notice of appeal to the USCA from the Opinion and Order filed 05-07-76. Copy mailed to : U.S. Attorney, S.D. of N.Y. Ent. 7-2-76
07-16-76	(11)	Filed Opinion # 44781--for the reasons stated, the Court finds that petitioner has raised no substantial evidentiary questions and declines to hold a hearing for any of thepurpo ses suggested in the motion. The Court adheres in all respects to the conclusions set forth in its opinion of 5-7-76. The motion is dnied. It is so ordered- PALMIERI, J. (m/n)
07-16-76	--	Filed memo endorsed on document #7--Motion denied. See copy of opinion dated 7-16-76 filed herewith. PALMIERI, J. (m/n)
07-16-76	12	Filed one (1) manila envelope sealed by order of PALMIERI, J. 7-16-76 See Opinion of 7-16-76 (Note 3) (filed in cashier's vah
07-30-76	(13)	Filed petitioner's notice of appeal to USCA from the opinion & order filed on or about 7-16-76.. Copy mailed to : U.S.Atty., SDNY.. Ent. 7-30-76

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MILTON SILVERMAN v. UNITED STATES OF AMERICA, 75 Civ. 1989 (ELP)
(68 Cr. 762) E.L.P.

Motion denied in all respects. See opinion dated May 5, 1976, filed herewith.

EDMUND L. PALMIERI
U. S. D. J.

Dated: New York, N. Y.
May 5, 1976

MICROFILM
MAY 7 1976

U.S. DISTRICT COURT
S.D.N.Y.

SOUTHERN DISTRICT OF NEW YORK

MILTON SILVERMAN,
Petitioner

vs.

UNITED STATES OF AMERICA

NOTICE OF PETITION AND MOTION
AND
PETITION AND MOTION

LLOYD A. HALE
ATTORNEY AT LAW
30 WEST 44th STREET
NEW YORK, N. Y. 10036
6/2-[illegible]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

MILTON SILVERMAN, :

Petitioner : NOTICE OF PETITION AND MOTION

vs. :

UNITED STATES OF AMERICA : (68 Cr. 762)

- - - - - - - - - - - - - - - - - - - x JUDGE PALMIERI
75 CIV. 4989

SIR:

PLEASE TAKE NOTICE, that there is hereby made a petition and motion on behalf of Milton Silverman in the United States District Court for the Southern District of New York, Foley Square, N.Y., returnable in Room 2303, on October 16th, 1975 at 4:30 in the AFTERNOON, pursuant to Section 2255 of Title 28 United States Code and the Fourth, Fifth and Sixth Amendments to the Constitution of the United States, upon the PETITION affidavits and exhibits ~~annexed~~ FILED HEREIN ~~hereto~~ and upon the proof to be brought forth at the hearing requested herein, to set aside the judgment of conviction entered in 68 Cr. 762 on or about April 25, 1969, on the grounds that the said judgment was the product of the prosecution's (1) knowing use of perjured testimony, (2) failure to disclose and suppression of evidence helpful to the accused, (3) intimidation of prospective defense witnesses, (4) failure to prove an offense, and (5) use of false evidence of domination, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, N.Y.
October 2, 1975

YOURS, etc.,

LLOYD A. HALE
Attorney for Appellant
and Movant
36 West 44th Street
New York, N.Y. 10036
972-0170

TO:
HON. PAUL J. CURRAN
United States Attorney
Southern District of New York
Attorney for the United States
of America

Copy RECEIVED
OCT. 8, 1975
PAUL J. CURRAN
U.S. ATTORNEY
S. D. N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

MILTON SILVERMAN, :

Petitioner, : PETITION AND MOTION

vs. : 68 Cr. 762
JUDGE PALMIERI
75 Civ. 4989

UNITED STATES OF AMERICA, :

- -X

MILTON SILVERMAN, by counsel, makes this petition and motion pursuant to 28 U.S.C. §2255, the Fourth, Fifth, and Sixth Amendments to the Constitution of the United States to set aside and vacate the judgment of conviction entered against him in the United States District Court for the Southern District of New York, on or about April 25, 1969, and in support thereof alleges:

1. According to the allegations of indictment 68 Cr. 762, as modified by the prosecution's evidence at the trial, the conviction here sought to be set aside was on the following charges (after reversal of the first eight counts on appeal):

(a) embezzlement, conversion, and misappropriation of the $1,000 proceeds from the sale to a junk dealer of an air - conditioning unit allegedly belonging to a union Welfare Fund in violation of 18 U.S.C., Sec. 664 (count 14);

(b) embezzlement, conversion and misapplication alleged to be in violation of 29 U.S.C., Sec. 501 (c) concerning funds of Local 810, I.B.T. allegedly used by petitioner, an officer, without proper authorization, for I.B.T. convention expenses (count 9), Christmas gratuities (counts 10 and 12), and personal loans (counts 11 and 13);

(c) causing false entries to be made in the Local 810 executive board minutes concerning the authorization of the Christmas gratuity and personal loan expenditures which were the

subject of the preceding counts (count 18), in violation of 29 U.S.C. Sec. 439(c);

(d) causing a false statement to be made in a form LM-2 submitted to the Secretary of Labor by Local 810 concerning union expenditures which were allegedly amounts embezzled, converted, and misapplied by petitioner, in violation of 29 U.S.C. Sec. 439(b) (count 15).

2. On each of the foregoing counts petitioner was sentenced to terms of imprisonment totalling 8 months, and a cumulative fine of $1,000 by the Hon. Edmund L. Palmieri, United States District Judge, April 25, 1969. The sentence was served; the fine paid. In addition, petitioner is now barred for a period of five years from serving in any official or employee capacity with a union or with a union welfare or pension plan, his previous employment, as a result of his conviction and is under other disabilities and disadvantages also as a result thereof.

3. The issues here raised were not previously raised on the direct appeal 430 F.2d 106 (2d Cir. 1970), cert. den 402 U.S. 953, reh. den. 403 U.S. 924 (1971) or the appeal from denial of a new trial, 469 F.2d 1404 (2d Cir. 1972), cert. den. 93 S.Ct. 2271 (1973).

4. This proceeding collaterally attacking the conviction is predicated on grounds not originally available to petitioner, as a result of the prosecution's known utilization of perjured testimony, Napue v. Illinois, 360 U.S. 264 (1967), the prosecution's failure to produce exculpatory material, Brady v. Maryland, 373 U.S. 83 (1963), and otherwise, United States ex rel. Fay v. Noia, 300 F.2d 345 (2d Cir. 1962), aff'd 372 U.S. 391 (1963).

5. In Kaufman v. United States, 394 U.S. 217, 224 (1969), the Government acknowledged that a proceeding under Section 2255 will lie even after prior federal appeals are exhausted where the claims raised "impugn the integrity of the fact-finding process or challenge the evidence as inherently unreliable..." 394 U.S. at 224.

6. The grounds raised in this petition meet the standards set by the Supreme Court in Kaufman; Supra:

> "The opportunity to assert federal rights in a federal forum is clearly not the sole justification for federal post-conviction relief; otherwise there would be no need to make such relief available to federal prisoners at all. The provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief." 394 U.S. at 226.

The factual and legal issues raised herein establish a hearing is required to meet the standards of due process and the constitutional guarantee of a fair trial. Kaufman v. United States, supra; Hayman v. United States, 342 U.S. 205 (1952).

KNOWING USE OF PERJURED TESTIMONY (I); FAILURE TO DISCLOSE AND SUPPRESSION OF EVIDENCE HELPFUL TO THE ACCUSED; INTIMIDATION OF PROSPECTIVE DEFENSE WITNESSES

7. Under count 18 of indictment 68 Cr. 762, charging petitioner with alteration of union records, the prosecution offered proof of the falsification (alteration) of the Local 810 Executive Board minutes for the December, 1965 meeting (Ex.3), particularly concerning the authorization of a loan to petitioner and Christmas expenditures made by petitioner. This proof was adduced through the testimony of an attorney, Jacob Friedland, who had been retained by Local 810 to examine the Local's records

prior to their submission to a grand jury pursuant to subpoena duces tecum, returnable in this courthouse in March, 1967. Friedland testified as a rebuttal witness under a grant of immunity (T.977ff). [1]

8. Because of the impact of Friedland's testimony, coming at the very end of the trial, that testimony undoubtedly swayed the jury as to all counts. That effect was also re-enforced by the very nature of count 18 which charged a general falsification of union records, although the proof was singular. Thus count 18 and Friedland's testimony indicating the minutes had been altered could have been -- undoubtedly was-- taken by the jury as evidence of guilty knowledge on the part of petitioner as to all other union transactions as to which they convicted him.[2] The Court's instructions to the jury emphasized that the evidence of fabrication of union records (count 18) should be considered in connection with all the evidence in the case. (A.1164).

9. It now has been established that the crucial testimony of Jacob Friedland was perjurious and that the prosecution so knew or had reason to know, but disclosed it neither to the Court nor to the defense.

10. Jacob Friedland testified at the trial that he had no recollection of the original state of the December, 1965, Local 810 Executive Board Minutes nor of any change that may have been made in them. By looking at his March 3, 1967, confidential report on the Local 810 records, Friedland testified that he came

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1. References in the form "T.___" are to the trial transcript; in the form "A.____" are to the record on appeal.

2. This seems fundamentally unfair, since, as was pointed out, in a previous application, the prosecution argued from Friedland's testimony that the change in the Dec. 1965 minutes was made in March, 1967, while the grand jury charged in count 18 that the fabrication was made during the 1965-66 calendar years.

to the conclusion that the last paragraph of page one of the December, 1965, minutes, dealing with a loan to petitioner and recompense to him for Christmas gratuities for third parties, had been changed (T.978-80).

11. Sophie Oschak, then secretary of the Local 810 Executive Board, and Max Sanchez, a member of the Board (whose affidavits are attached hereto) recall not only that it was Miss Oschak who retyped the first page of the Dec. 1965, minutes in March, 1967, but that she did so in the presence of Jacob Friedland and under his instructions after he had been retained by Local 810 to examine its records subsequent to service upon the Local of a grand jury subpoena duces tecum calling for the production of Local records including the 1965-66 minutes.

12. Jacob Friedland, Miss Oschak and Mr. Sanchez attes had first asked them if, in fact, the Executive Board at its December, 1965, meeting had authorized the disbursements in question to petitioner. When they reported to Friedland that authorization had been duly voted, he told Mrs. Oschak that the minutes would have to be changed to reflect the authorization. Jacob Friedland then handed Miss Oschak a slip of paper and told her to replace the then last paragraph of the first page of the December, 1965 minutes with the language on the slip. After she had retyped the first page of the minutes, Miss Oschak gave them to Friedland. Petitioner was neither consulted about nor informed of the change (see also T. 931).

13. Herman Brickman [3] (affidavit annexed hereto), who was present at the discussion between Oschak, Sanchez, and Friedland, and long familiar with the general conduct of union affairs

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3. No relation to Henry Brickman, former house counsel to Local 810.

(but not Local 810 in particular) offered his opinion that minutes were frequently changed in this fashion to reflect what had actually transpired at a union meeting because the persons who prepared such minutes were not skilled in or familiar with the language best suited to reflect the action taken.

14. Mr. Herman Brickman was an independent arbitrator who had no relation with Locals 810 and 1614 nor the Welfare Fund. He was present at the former offices of Local 810 on the occasion just discussed to confer with Jacob Friedland, who represented the Local in some difficult organizational proceedings. Mr. Brickman, who had been asked to intercede by the employer, not Local 810, I.B.T., did not know a grand jury subpoena had been issued for the Executive Board minutes nor that Jacob Friedland had been retained subsequent to service of that subpoena to render a report on the union records. Mr. Brickman was also unaware that there was a trial and conviction of petitioner at the time and only accidentally later learned of the nature of Jacob Friedland's testimony.

15. In the circumstances of the Friedland testimony, the role of the prosecution seems misconduct and tantamount to a denial of due process.

16. Miss Oschak and Mr. Sanchez had been called repeatedly before federal grand juries in this District, informed by the prosecutor that they were targets of the investigation and badgered about invocation of their Fifth Amendment privileges on advice of counsel, in a manner which indicated to them that in some way they were being threatened with implication concerning dealings with petitioner, past, present or future. They were subpoenaed by the prosecution at the trial, sequestered, but not

called, so that they were unaware of the testimony given. Because of the reluctance and fear induced by what they regarded as threats to them by the prosecution, they were and have been unwilling to communicate about events covered by the trial. This was effectual suppression of their testimony, since they feel, accurately, it is submitted, that they did nothing wrong and that the change in form of the Executive Board minutes was not a change in substance but accurately reflected union business and was a formal change directed by an attorney who, they knew, represented the union.

17. Reference to the record of the trial in this case in the light of these recent revelations gives rise to the unmistakable inference that the prosecution had reason to know of the false nature of Jacob Friedland's testimony in ample time to alert the defense which it did not do.

18. Jacob Friedland testified that he would not have appeared as a Government witness without a grant of immunity (T.979). The prosecutor, Mr. Maloney, stated to the Court just prior to Friedland's testimony that he had oral authority from the Attorney General of the United States, with written authority en route to grant Jacob Friedland immunity from prosecution pursuant to 18 U.S.C,, Secs. 2514, 2516(1)(b).

19. Earlier in the trial, the Court was informed by the prosecutor that Jacob Friedland's own attorney, Robert Scher, had advised that Jacob Friedland would invoke his privilege against self-incrimination if called as a witness (T.466). That statement was made during the course of a voir dire examination of Jacob Friedland (T.467-75,609-10) held to enable the trial court to determine whether Jacob Friedland's testimony and disclosure of his confidential report to Local 810 (Ct.Ex.6) would

be in violation of the attorney-client privilege between himself and the Local. Eventually the trial court overruled the claim of attorney-client privilege and, sui motu, put in evidence that part of page 11 of the confidential report which stated that there was no approval by the Local 810 Executive Board of the December, 1965, $2,000 loan to petitioner (Ex.G-A; T. 1002, 1004). The ground for the latter ruling was stated to be that the portion of the report admitted was not confidential since it merely, allegedly, showed what the original minutes stated, thus demonstrating that the minutes before the Court were "fabricated". The ground for the former ruling was stated to be that suppression of Friedland's testimony might prevent "the disclosure of an illegal or fraudulent act hatched in the future" (T.615) and determination of "whether these minute books were authentic books at the time they were produced for the government or whether they were partially fabricated." (T.620)

20. During the hearing on that issue, the trial court appeared to be of the opinion that Jacob Friedland himself was innocent of any wrongdoing, that he had consulted with Local 810, examined its books, and prepared his report in good faith, and that he had not acted in concert with the defendant or anyone else in the alleged alteration of the minutes (T.614,620-21,637).[4] The Court's opinion of Friedland's non-involvement appeared to be sufficiently strong to have caused it to overrule Friedland's claim of his privilege against self-incrimination as well, since the Court concluded that its invocation could only protect the defendant (petitioner) or persons in league with the defendant (T.651). The reason the trial court ruled otherwise was not

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4. Indeed, in a pre-trial proceeding, Judge Murphy quashed a prosecution subpoena for Friedland's confidential report on the ground that no showing had been made that the report was rendered for the purpose of committing a fraud or crime (A.79).

because Friedland testified that the prosecutor had warned him that he was a target (T.633), as to which the trial court at first seemed skeptical (T.634), but because the prosecutor confirmed it (ibid.). The following admission by the prosecutor, crucial to this petition, took place:

> "THE COURT: Do you know of any evidence, Mr. Maloney, which would possibly link Mr. Friedland with the alleged fabrications of the portions of these minutes, Exhibits 3 and 5?
>
> MR. MALONEY: Yes, your Honor, I am afraid I do, but it is not before your Honor or before this Court." (T.646-7, emphasis added)

21. Before offering formal immunity, the prosecutor proffered a personal undertaking not to prosecute Jacob Friedland if he gave only the limited testimony, eventually forthcoming, that the December, 1965, Executive Board minutes, when he first saw them, were not in the same form as those produced in Court (T.647). Although such testimony undoubtedly satisfied the prosecution's purposes, resulting as it did in a conviction; it did not satisfy the ends of justice or satisfy the prosecutor's duty to make exculpatory material available to the defense and to ensure that perjurious testimony not infect a criminal trial. These facts alone show that the prosecution, without excuse, purposely and wilfully suppressed and concealed exculpatory evidence.

22. As the prosecutor knew of evidence indicating Jacob Friedland's involvement, it had to be evidence indicating he had a role in the change of the minutes.[5] The prosecutor had been repeatedly admonished, pre-trial by Judge Murphy and at the trial by Judge Palmieri, that wrongdoing on the part of Jacob Friedland could not be spelled out from the only submission the prosecution was willing to make in open court: retention of

---

5. By contrast, the prosecution was able to produce no proof that petitioner had such a role. The trial court charged the jury: "There is no evidence in this case linking any action of the defendant with the alleged fabrication." (T.1164)

Friedland by Local 810 after service upon it of grand jury subpoenas for its records (including the executive board minutes) to examine those records, his examination of them and his confidential report to the Local. Were that all the prosecutor knew, he would undoubtedly have gone along with the trial court's indicated action of overruling Friedland's claim of privilege. The prosecutor's attempted assurance of informal immunity and his stated securing of statutory immunity for Friedland is a clear indication that the prosecutor knew significantly more about Friedland's direct involvement in the alteration of the minutes.[6] From the annexed affidavits of Miss Oschak and Messrs. Brickman and Sanchez, we now know what that involvement was. None of the required disclosures were made by the prosecution.

23. Under Brady v. Maryland, 373 U.S. 83 (1962), the prosecutor had an affirmative duty to disclose the exculpatory material to the defense.

24. Under Napue v. Illinois, supra; Miller v. pate, 386 U.S. 1 (1967), the prosecutor had a duty not to present perjured testimony or false evidence and to undertake its eradication once it came forth. Yet the prosecutor in this case solicited and allowed to remain before the jury the testimony by Jacob Friedland that he had no recollection of the contents of the original executive board minutes other than by use of his confidential report (T.978-9, 981, 983-4, 985-6, 991), that he did not know what changes had been made in the minutes (T.979, 986), that he could not say whether the first page or the second page of the minutes had been changed (T.985).

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6. It is not without significance that at the pretrial quashal proceedings, the same prosecutor urged, unsuccessfully, that Judge Murphy examine ex parte grand jury minutes which purportedly showed Friedland's role was to further a criminal enterprise or fraudulent act (A.76).

Under this circuit's decision in United States v. Remington, 191 F.2d, 246, 251 (2d Cir. 1951), holding such conduct tantamount to spoliation, the prosecution had a duty not to threaten prospective or possible defense witnesses with prosecution repeatedly so as to make them effectively unavailable to the defense.

All of these duties were violated in this case. Violation of any one is sufficient to require vacation of the judgment of conviction.

USE OF PERJURED TESTIMONY
BY THE PROSECUTION (II)

25. Deliberate use of perjured testimony by the prosecution in a criminal case is subject to at least the same strictures as the willful and/or knowing use of false or perjurious statements by a citizen charged with a criminal offense therefor. The Second Circuit has held that, in addition to proof of knowledge of falsity (always subjective and elusive), a person may be held to have violated his duty to see that only truthful statements are made in important public matters on a showing that he was in a position to know or ascertain the truth but failed to make reasonable inquiry, blinded himself to the facts, or indulged in conduct which indicated either an intent to conceal or a careless disregard for the truth. See United States v. Sarantos, 455 F.2d 877, 880-1 (2d Cir. 1972); United States v. Jacobs, 475 F.2d 270, 287 (2d Cir. 1973); the charge of the Honorable Edmund L. Palmieri in United States v. Egenberg, 441 F.2d 441, 444 (2d Cir. 1971); and in this very case (T.1146). See also Wild v. Oklahoma, 187 F.2d 409, 410 (10th Cir. 1951), and the opinion of Chief Justice Burger in Giglio v. United States, 405 U.S. 150, 152-4 (1972).

testimony but, in my case, although I was promised immunity,

This standard of conduct, required even of ordinary citizens, is far higher when applied to prosecutors and investigators in criminal cases. Napue v. Illinois, 360 U.S. 264, 269 (1967). When that standard is applied to the instant case, it is evident that petitioner's conviction falls squarely within the prohibition and must be vacated.

26. The conviction on count 14, for example, was based on the testimony of Paul Chlystun to the effect that he, at the direction of his superiors, contacted Milton Silverman about the removal of air-conditioning units from the building actually owned by the Welfare Fund (not Local 810, I.B.T., as Chlystun testified) which eventually led, Chlystun said, to his giving Mr. Silverman $1,000 in cash, the sale price of the units to the junk dealer Katz. This testimony was completely false and the prosecution was in a position to determine its falsity.

27. Had the prosecution made reasonable inquiry of Reader-Green, the general contractor on the demolition and reconstruction, and examined the documentary evidence, to wit, the written agreements for demolition of the Welfare Fund building, it would have ascertained that:

(a) The air conditioners were the property of Morrison-McCarthy, the subcontractors in that area, under contract provisions (see annexed affidavits of Robert Blakeman, Esq., and Lawrence Cohen) and not owned by the Welfare Fund or Local 810;

(b) Any other material removed by Katz from the premises, included in the $1,000 payment to Chlystun was the property and responsibility of Reader-Green or other subcontractors and not of the Welfare Fund or Local 810 (ibid.);

(c) Chlystun was instructed to contact Marcus, a principal of Morrison-McCarthy, concerning removal of the air-conditioners, since it was their property and responsibility (see annexed Cohen affidavit). That Chlystun followed those instructions is the only inference from the facts that Katz was contacted by Morrison-McCarthy and Marcus was at the Welfare Fund construction site when Katz arrived to make payment (T.442);

(d) Chlystun was ordered to have the conveyor removed by Lawrence Cohen, his superior at Reader-Green, without any consultation with Milton Silverman, the Welfare Fund, or either local, since that item was by contract and trade custom the property of the general contractor as was the responsibility for its removal (see Cohen and Blakeman affidavits, infra);

28. If the foregoing facts were not in the possession of the prosecution at the time it offered the perjured testimony of Chlystun, it was because the prosecution's investigation amounted to a pattern of avoiding proper inquiry which appears almost studied. No inquiry was made of George Greenberg, a principal of Reader-Green, concerning ownership of the items removed by Katz, nor of anyone else at that firm (see Blakeman affidavit, infra). An F.B.I. agent did interview Lawrence Cohen, Chlystun's superior, but assiduously avoided any inquiry into the Katz transaction (see Cohen affidavit, infra). Instead the agent only questioned Mr. Cohen about some work done by the general contractor at Mr. Silverman's home. (Ibid.) When the agent was informed that Mr. Silverman had paid for the work, the inquiry ended. (Ibid.)

29. Marcus, the representative of Morrison & McCarthy who dealt with Katz and Chlystun, who participated in these transactions, was questioned by the Government, it is believed, and is

not available for interview. In the interests of justice, it is respectfully requested that the United States Attorney be required to disclose what he and the investigating agents learned and obtained from Marcus and from any other representative of Morrison & McCarthy.[7]

30. The perjured testimony in support of count 14 may well have tipped the scales against petitioner as to all counts since it presented the jury with the most graphic -- and only-- instance of a purported direct conversion of a Welfare Fund or union asset into a personal cash receipt in a transaction not recorded in any fashion on Fund or union reports or records. All the other counts on which conviction stands concern allegedly improper disbursement of funds to petitioner and the concealment of those transactions through false reports and alleged change of union records (the Local 810, Dec. 1965, Executive Board minutes under count 18). Under these circumstances, it cannot be said that there was no spillover of the tainted evidence from count 14 to the remaining counts. Therefore the conviction should be vacated on them as well. United States v. Hines, 256 F.2d 561 (2d Cir. 1958); United States v. Barash, 365 F.2d 395 (2d Cir.1966).

THERE WAS NO CRIME AS ALLEGED IN COUNT 14

31. The conviction on count 14 must be reversed and the count dismissed or a judgment of acquittal entered because the crime alleged could not have been and was not committed.

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7. Over a year ago, counsel requested of the United States Attorney's office that there be produced for inspection the original trial exhibits, material produceable under 18 U.S.C. §3500 and under Brady v. Maryland, supra, and the documentation and other material concerning the grant of immunity to Jacob Friedland. While representatives of the United States Attorney's office agreed to produce it, it has not yet been produced. Some files were produced recently by the United States Attorney's office but they did not contain the requested material.

32. Count 14 of indictment 68 Cr. 762 charges that petitioner converted property (i.e. the aforementioned air conditioners) of the Welfare Fund into $1,000 cash allegedly delivered to him. The contract between Reader-Green, the general contractor for the demolition and reconstruction of the Welfare Fund building, and the Welfare Fund, the subcontract between Reader-Green and Morrison & McCarthy, the subcontractor for air-conditioning on the building, the affidavit of Robert Blakeman, Esq., the attorney who drew the contracts on behalf of the general contractor, the affidavit of Lawrence Cohen, supervising engineer for the general contractor, conclusively establish that on July 18, 1966, or, indeed, any date after the contracts were signed on April 6, 1966, the material paid for and removed by Katz was the property of the general contractor and one or more subs and not that of the Welfare Fund.

33. Did the prosecution and/or its investigators know this but, nonetheless, rely on the irrelevant lease provisions alone so that the Court, the jury, and the defense, were misled? The answer to that question may be within the prosecution's files. (See footnote to paragraph 29, supra). Even if the question be answered in the negative, dismissal of count 14 is still required. It is a fundamental denial of due process to allow conviction of a crime which could not have been committed.

34. Section 49 of the Specifications for Heating, Ventilating, and Air Conditioning Work on the Welfare Fund building provides:

> "(a) This Contractor shall perform all necessary demolition, removals and relocations . . .
>
> * * * * *
>
> "(c) Remove all existing ... air conditioning units....
>
> * * * * *

"(c) Removal shall include taking from the premises and disposal of removed items."

Similar language is contained in the general contract. There is also a provision that allows the owner of the premises (i.e., the Welfare Fund) to except material from the removal and disposal provisions of the contract if the owner designates a location to which it wishes the material removed. Such designation does not include scrapping, the only work carried out on the air-conditioners, however, as the specifications in the contract provide: "Those items turned over to the Owners shall be cleaned and placed in good repair."

35. Mr. Blakeman and Mr. Cohen attest that under the foregoing contract provisions, any scrap value of material, including that of the air conditioning units, required to be removed does not enure to the owner of the premises (the Welfare Fund) but to that contractor whose duty it is to remove it. Further, according to Mr. Cohen, who had over-all supervision of the Welfare Fund job, no exceptions or designations were made by the Fund from or to the removal and disposal provisions of the contract.

36. Thus, as a matter of law, the air conditioning units were not the property of the Welfare Fund and, therefore, could not serve as the basis for a federal conversion charge against petitioner.

37. Even if it were to be assumed that petitioner received the $1,000 referred to in count 14,[8] that would be solely a civil wrong against a general or subcontractor, and not merely a variance from indictment 68 Cr. 762. Cf: Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270 (1960). It would simply not support any version of the charge in count 14 and would be, as it was, beyond the criminal jurisdiction of this Court. See United

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8. The perjurious testimony of Chlystun, as shown herein, and the facts set forth in the previously filed motion for a new trial demonstrate that petitioner did not receive the $1,000.

States v. Archer, 486 F.2d 670 (2d Cr. 1974); see also Fay v. Noia, 372 U.S. 391, 408-09 (1963).

38. As noted supra, the vivid, if erroneously proffered and received, evidence under count 14 is the solitary instance of an alleged direct cash payment to petitioner, nowhere recorded on Fund or Local records which, as it could not but have influenced the jury's verdict on the remaining counts, requires reversal there as well. United States v. Hines, 256 F.2d 561 (2d Cir. 1958); United States v. Barash, 365 F.2d 395 (2d Cir. 1966).

FALSE EVIDENCE OF DOMINATION

39. In its original opinion in this case, the Second Circuit dealt at length with a troublesome issue raised by the prosecution, the alleged "Domination and Control" by petitioner of the union locals. United States v. Silverman, 430 F.2d 106, 123-4 (2d Cir. 1970). The appellate court made specific reference to Exhibit 47, the notice to union employees served with subpoenas to inform union counsel:

> "The manner in which the union was operated was also illustrated by the so-called 'gag order' issued under the name of Milton Silverman. It was personally served by a 'security officer' on twenty-eight officials of the labor organizations involved. It stated:
>
> 'If you are approached by any Federal investigators do not give them any information. Refer them to our attorney, Mr. Shivitz.'
>
> 'Anyone disregarding these orders will be summarily terminated.'
>
> (Emphasis in original.) The government, after having confronted Silverman on the stand with this document, made use of it during summation to show his domination and control over the unions." 430 F.2d at 124.

40. In his summation reference to Exhibit 47, the prosecutor asked if the powers allegedly implied by that notice, which he attributed to petitioner were not Hitlerian despotism, which colored all counts: "Are those the words of Samuel Gompers... or

are they the words of Adolph Hitler?" (T. 1095, prosecutor's summation).

41. When objection was made to these remarks as inflammatory and prejudicial, the trial court overruled it (T.1106). Yet near the beginning of the Court's instructions, the jury was told that the defense summation was erroneous and the errors were pointed out at length (T. 1111-14).

42. The crucial consideration, ignored by the prosecution, was : Were they the words of Milton Silverman? It now appears that they were not and the conviction must be vacated.

43. The annexed affidavit of William Doherty, at the time the dispatcher for Local 810, now retired, indicates that it was he and another employee, not petitioner, who prepared the notice, that it was counsel for the Local who requested that some means be taken to ensure he was contacted when any union employee was served or approached (counsel confirms this in a separate affidavit), that it was Doherty alone who inserted the final sentence of the notice containing the threat of termination and had the notice typed by another employee of the union who also typed on petitioner's name, all without consulting petitioner (the other employee confirms this).

44. The only source for the statement by the Court of Appeals that Doherty "personally served" the notice on 28 union employees and officials is the prosecution's brief on appeal; there is no basis for it in the record. Mr. Doherty's recollection is that he served no one with the notice or a copy of it.

45. Mr. Doherty was not present at the trial and did not learn until recently that the notice of August, 1967, which he had prepared, had any significance.

46. Even if the showing here advanced in connection with the spurious attribution of the notice (so vividly described

by the Court of Appeals as a "gag order"; scarcely less inflammatory to a jury of laymen) to petitioner was not alone sufficient to jusitfy the relief requested, it is still another indication of the erroneous nature of the judgment and of the likelihood that petitioner would prevail on what, if any, counts are to be retried after vacation of the judgment of conviction.

WHEREFORE, it is respectfully prayed that the judgment and sentence be vacated, that the indictment be dismissed and that a hearing be held on this petition, and for such other and further relief as to the Court may seem just and proper.

LLOYD A. HALE
Counsel for Petitioner, Movant,
Milton Silverman
36 West 44th Street
New York, New York 10036
972-0170

VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MILTON SILVERMAN, being duly sworn, deposes and says: deponent is the petitioner and movant in the within action; deponent has read the foregoing petition and motion and knows the contents thereof; the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters deponent believes it to be true; deponent did not know of the facts stated therein at the time of the trial and only learned of them from the investigation that led to the making of the petition and motion.

MILTON SILVERMAN

Sworn to before me this

day of , 1975.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA,

-against-

MILTON SILVERMAN,

Defendant.

- - - - - - - - - - - - - - - - - - -X

STATE OF NEW YORK)
) S.S.:
COUNTY OF NEW YORK)

SOPHIE OSCHAK, being duly sworn, deposes and says:-

1. I have been employed by Local 810, IBT, for over twenty-nine years and was the duly elected Secretary of the Union, and the Recording Secretary of the Executive Board of the Union for many years, including the year 1965. I was a trustee of the United Wire, Metal and Machine Welfare and Pension Funds of Local 810, IBT, until December 31, 1970.

2. When I was Secretary of the Union and when I was Recording Secretary of the Executive Board, I attended all Executive Board meetings, kept notes of what transpired, and thereafter prepared and typed the minutes of the meetings. I used, as a format, minutes of prior Executive Board meetings.

After I prepared minutes of the meetings, I always submitted them to other members of the Executive Board, including our house counsel, and if the minutes as recorded conformed to their recollections of what had transpired, the minutes would be signed by each Executive Board member and placed in the minute book.

3. In February 1967, the Union was served with a Grand Jury subpoena requiring production of specified books and records, including the minutes of meetings of the Executive Board. In accordance with our established union policy, any legal matters other than labor law matters are referred to outside counsel. Accordingly, the Grand Jury subpoena in question was referred to attorney JACK FRIEDLAND, ESQ., of the firm of FRIEDLAND, SCHNEIDER AND FRIEDLAND, ESQS., for examination, evaluation and opinion.

4. JACK FRIEDLAND, ESQ. came to Union headquarters, at 842 Broadway, New York, and examined the Union Constitution, By-Laws and other books and records called for in the subpoena, including the minutes of the Executive Board meetings which I had prepared. MR. FRIEDLAND talked with me and other union officers about the matters involved in his examination.

5. JACK FRIEDLAND, ESQ. submitted his written report to the Union, dated March 3, 1967, which made reference to a number of loans and payments, including the following:

> "There is a loan to Milton Silverman in December 1965 and there is no approval of this loan by the Executive Board. There is a payment of $2,000.00 to Mr. Silverman in December 1965 for Christmas gifts and this requires an accounting of where the money was spent."

A copy of the complete report is annexed for evaluation, in view of the inordinate significance placed upon the quoted excerpt from the report. Significantly, the report is dated March 3, 1967, a date after the Grand Jury subpoena was served.

6. After the report was submitted, MR. FRIEDLAND asked me and other Executive Board members, if the members of the Executive Board had, in fact, adopted resolutions approving a loan of

$2,000.00 to MILTON SILVERMAN and the payment to MILTON SILVERMAN of $2,000.00 for Christmans gifts. I told MR. FRIEDLAND that these two matters had, in fact, been discussed by the members of the Executive Board, and had been sanctioned and approved by the Board members. MR. FRIEDLAND then said that it legally permissible and proper to clarify and re-do the minutes so as to accurately reflect what had occured at the meeting.

7. Shortly thereafter, MR. FRIEDLAND came to the Union headquarters to discuss a labor problem. While he was talking with HERMAN BRICKMAN,ESQ., about conditions in a shop having labor trouble with Local 810 , IBT, I came into the room with MAX G. SANCHEZ, an officer of the Union. MR. FRIEDLAND handed me a prepared , typewritten slip of paper, containing one paragraph of typewritten material. In the presence of HERMAN BRICKMAN, ESQ. and MAX G. SANCHEZ, MR. FRIEDLAND told me that he had prepared the necessary clarification for the minutes of December 3, 1965, instructed me to re-type and re-do the minute to incorporate in the minutes the matter on the piece of paper he handed to me. Pursuant to his instructions and directions, I re-typed the first page of the minutes of the Executive Board of December 3, 1965.

8. MILTON SILVERMAN was not present at this time and to my knowledge knew nothing about the matters we had discussed referring to the minutes and the re-typing of the minutes. I did not tell MR. SILVERMAN about this incident.

9. I did not discuss these facts nor disclose this information due to the actions and methods of the government, which I understood to threaten me with prosecution if I interfered with their purposes in prosecuting the defendant. From the inception of the government's investigation, which gave rise to the indictment and subsequent conviction of MILTON SILVERMAN , I was repeat-

edly warned that I was a target of the government investigation and the proceedings were kept pending as a constant threat over my head. As a matter of self-preservation and on the advice of counsel, I was advised to refuse to talk to anyone involved in the matters under investigation and especially not with MILTON SILVERMAN in spite of the fact that my information might have exculpated them of any wrongdoing. The government threats were directed against everyone in the Union office who was subpoenaed and all of us were frightened and apprehensive. I submit that but for the actions of the government in threatening and intimidating me, I would have revealed the truth of the events which gave rise to the indictment and conviction of MILTON SILVERMAN on the charge of falsifying Union records.

10. On August 21, 1967, I was served with subpoena for the first time, requiring my appearance before the Grand Jury. At that time, the crime under investigation was Title 18 U.S.C. 371, charging conspiracy, which was explained to me to require two or more persons to agree to commit an illegal act. The United States Attorney told me and other Union members subpoenaed that we were targets in the investigation, and I was questioned about payments made by the Union on bills which bore my initials or handwriting authorizing payment. When I refused to answer questions, the subpoena was adjourned but kept open without date, which I felt was a constant threat against me that I might be indicted. I was told that MILTON SILVERMAN was under investigation for having embezzled and misappropriated Union funds, and some of which was paid on the bills which had my initials or handwriting authorizing payment.

11. On March 5, 1968, I was again served with a Grand Jury subpoena, again referring to an investigation of the crime of

conspiracy. I was sworn in and the questions propounded referred to embezzlement and misappropriation of Union funds by MILTON SILVERMAN and others. I was again warned that I was one of the targets of the investigation, and I refused to answer questions. I was advised that the matter was adjourned without date and that I would be given immunity and then would be required to testify. I was told clearly and unequivocally that I was directly involved in the matters under investigation and would be expected to testify to matters which could incriminate me but for the immunity I was promised. Most significantly, I never received the immunity but the Grand Jury proceedings were held over me as a constant threat to my freedom.

12. After my refusal to testify before the Grand Jury, on July 29, 1968, I was required to appear and testify, pursuant to a summons served upon me by the government Internal Revenue Service. I was asked questions about matters which I had refused to answer before the Grand Jury, and I refused to answer. I was interrogated about printing bills which bore my initials or handwriting, about additions or changes to Executive Board minutes and other activities of MILTON SILVERMAN, and I was obliged to refuse to answer questions in the matter before the Grand Jury as I was apprehensive that I was the continuing object of the government's investigation of claimed wrongdoing.

13. To increase my apprehension, and to make more apparent the coercive effect upon me of the government's action, which prevented me from having any discussions with MR. SILVERMAN, his lawyer, or my co-workers, the record will disclose that immunity was in fact

granted to other co-workers by the government to secure their testimony but, in my case, although I was promised immunity, it was never forthcoming.

14. I respectfully submit that the so-called 'clarification of the minutes of the Executive Board, which is constantly referred to by the United States Attorney throughout the transcript of proceedings, referred to by the Trial Court as bearing upon possible obstruction of justice and referred to by the Appellate Court as justification for the jury's decision, was physically performed by deponent in the presence of MAX G. SANCHEZ, as directed and counseled by the Union attorney, who later became a government witness in this matter.

WHEREFORE, I respectfully join in the request for relief in this application.

SOPHIE OSCHAK

Sworn to before me this
17th day of April 1973.

Notary Public

JEAN LAUREN
NOTARY PUBLIC, State of New York
No. 31-7447050
Qualified in New York County
Commission Expires March 30, 1974

submitted but before the Executive Board minutes were

RE: LOCAL 810 RECORD KEEPING

Dated: March 3, 1967

FRIEDLAND, SCHNEIDER & FRIEDLAND
Attorneys for Local 810
591 Summit Avenue
Jersey City, N. J.

6. The last paragraph of the minutes as changed is not

I have checked the Cash Disbursement Ledger as well as the minutes of Local 810 and also the Constitution and By-Laws of Local 810.

I examined the By-Laws specifically for the purpose of determining the authority of the President and the Executive Board to make certain disbursements.

Article VI, Officers, provides in Section 5.02 that the President is empowered as follows:

> "He shall manage the office, and the business affairs of the Union; he shall be in charge of all organizational activities. ***
>
> He shall engage the requisite organizational, office and professional help. He shall fix the salaries of all elected officials other than his own, and the salaries of all organizers, delegates, assistants, business agents, office help and the remuneration for all professional services. *** He shall approve funds for administration and organization needs. He may fix the compensation to be paid any member of the Local who loses time from his regular employment on business of the Local. ***
>
> *** He shall conduct all business of the Local, act as purchasing agent for the Local, enter into, make, perform, carry out and enforce all contracts; purchase, lease, exchange or acquire, sell and convey any real or personal property, or perform any other acts which,

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in his opinion, he shall deem necessary for the proper conduct of the Local. *** He shall have the right to incur all debts and to pay all bills. *** He shall have such other duties and powers, not herein outlined, as he may deem necessary to further the welfare and proper administration of the Local. His salary shall be fixed by the Executive Board. ***

*** He shall, together with the Secretary-Treasurer, make all expenditures authorized herein for Union purposes, unless specially prohibited by action of the Executive Board. *** "

The powers of the Executive Board are regulated by Article VII and with respect to financial matters are authorized as follows:

Section 7.02 - ***

"(b) The Executive Board shall be empowered to pass upon any unusual expenses incurred by any of the officers of the Union;

"(c) It is not intended that the provisions hereof shall prevent the President and Secretary-Treasurer from making any and all disbursements for Union purposes without first obtaining the approval of the Executive Board and any and all such payments are hereby authorized to be made by the President and Secretary-Treasurer;

"(d) Shall pass upon any direct or indirect loans exceeding $1,000 but not exceeding $2,000, as it deems appropriate and with such arrangements for repayment as it may deem proper to the extent permitted by law.

***

"(g) To lease, purchase or otherwise acquire in any lawful manner for and in the name of the organization, any and all real estate and other property, rights and privileges whatsoever

deemed necessary or convenient for the conduct of its affairs, at such price or consideraton and generally on such terms and conditions as they think fit, and at their discretion, to pay therefor either wholly or partly in money or otherwise;

"(h) Sell or dispose of any real or personal estate, property, rights, or privileges belonging to the organization whenever in their opinion its rights would thereby be promoted;

"(i) Create, issue and make deeds, mortgages, trust agreements and negotiable instruments secured by mortgage or otherwise, and to do every other act or thing necessary to effectuate the same.

"(j) Create pension and severance pay trusts or join in or participate in such trusts for the officers, agents and employees of the Local Union on such terms and conditions as it may deem proper, and to effectuate and terminate the same. It is provided, however, that no pension or severance pay trust may be terminated which will, in any way, affect adversely the rights of any and all beneficiaries thereunder. It is further provided that the peasion fund created hereunder shall not be diverted to any other use or purpose except for the purpose of paying the pensions herein provided."

Article VIII deals with the salaries and expenses of officers, as follows:

"Section 8.01. The President, Vice-President, Recording Secretary, Secretary-Treasurer and three Trustees shall continue to receive the salaries, benefits, allowances and expenses in effect at the time of the adoption of this Constitution and By-Laws.

"Section 8.02. The salaries, benefits, allowances and expenses of all other persons who are now or hereafter may be employed by the Union shall be determined and set from time to time by the President.

"Section 8.03. Whenever rank and file members of this organization are engaged in activities on behalf of the Union they may be compensated by the President for such services from the General Fund. Provided, however, they must have been duly authorized to so serve and act and informed that they would be reimbursed in an amount fixed by the President. Provided, further, neither compensation nor expenses shall be paid for attending membership meetings."

Article IX deals with special allowances as follows:

"Section 9.02. Because of the circumstances described in Section 9.01 above, and in addition to allowances for expenses directly incurred in handling our Union business and affairs, they are expressly authorized and empowered to expend from our funds reasonable amounts for the following purposes:

(a) To make long-distance telephone calls while on out-of-town trips;

(b) To pay for the meals of themselves and others whenever they work after the evening dinner hour in their home area;

(c) To entertain for the purpose of establishing and maintaining contacts with persons, organizations and institutions which tend to foster the good and welfare of this organization."

It would seem from the foregoing provisions of the By-Laws that the President is authorized to hire employees and to pay out moneys for Union purposes, except that loans for over $1,000 are required to be approved by the Executive Board of the Union.

From the Cash Disbursement book for 1965 I have taken out the following items. These items deal principally with organizing expenses, loans, bonuses, travelling expense, purchase of liquor, cigars, restaurant bills, etc. I have not taken all of the items out but most of them are as follows:

JANUARY 1965

Check #	Payee	Amount
1326	Falk & Orleans Good & Korduala - legal	$ 500.00
1327	Alec Goldman - loan	200.00
1329	Herman Frigaurd - expenses reimburs.	30.00
1328	Leon Pastor - Staff organizing expenses	200.00
1330	Black Angus	86.27
1342	New Rochelle Wine & Liquor	57.24
1348	Luther Quinars - Organizing expense	75.00
1352	Blue Sea Restaurant	25.30
1361	Luther Quinars - Organizing expense	75.00
1362	Milton Silverman - Chicago	56.00
1382	Luther Quinars - Organizing expense	75.00
1383	Newcomb Boher - Organizing expense	75.00
1388	Anthony Provenzano - Testimonial Dinner	500.00
1389	Testimonial Dinner H. Frigand	75.00
1393	Luther Quinars - Organizing expense	75.00
1399	Paolo - bonus	150.00
1400	Spano - bonus	150.00
1401	Vadoric - bonus	150.00
1402	William - bonus	150.00
1410	Beher - organizing expense	75.00

FEBRUARY 1965

Check #	Payee	Amount
1414	Frank D'Ambrosia - organizing expense	250.00
1415	Jerry Martin - organizing expense	75.00
1417	Black Angus - organizing expense	128.85
1420	Luther Quinars - organizing expense	75.00
1440	" " " "	75.00
1441	U.W. M & M Pension Fund - loan	40,000.00
1445	Frank D'Ambrosia - organizing expense	200.00
1446	Wilford Gale - organizing expense	100.00
1472	Trans World Airlines - M.Silverman	449.40
1474	Wire Association Convention	400.00
1475	Hotel Flamingo	18.75
1476	Hotel Seville	200.00
1480	Nat Liberti - loan	100.00
1495	Dana Hoffman - organizing expense	200.00
1496	Local 210 - organizing expense	250.00
1497	M. Silverman - wire ass'n conv.	78.00

MARCH 1965

1541	Frank D'Ambrosia - organizing expense	200.00
1538	Jack Giordano - organizing expense	55.00
1554	" " " "	125.00
1569	Irving Miller -organizing expense	200.00
1571	Herman Frigauli - strike expense	75.00
1573	Dana Hoffman - strike expense	65.00
1574	Dana Hoffman - strike expense	50.00
1608	Dana Hoffman - strike expense	65.00
1609	Dana Hoffman - strike expense	50.00
1613	Frank D'Ambrosia - organizing expense	200.00

APRIL 1965

1618	Leon Pastor - loan	200.00
1632	Dana Hoffman - loan	500.00
1633	Thomas Auld - loan	500.00
1646	Black Angus	64.56
1668	Monte Cristo Cigar Co.	130.00
1704	Jack Keane - organizing expense	175.00
1707	John Colon - organizing expense	50.00
1708	" " " "	50.00

MAY 1965

Check #	Payee	Amount
1724	Gabriel Ciorcammi - loan	25.00
1726	Black Angus	21.41
1759	Joseph Lovell - loan	300.00
1768	Esther McKaney - organizing expense	100.00
1815	Milton Leonard - strike expense	125.00

JUNE 1965

1962	Cavanaughs - organizing expense	387.71
1816	Leonard H. Beger - loan	500.00
1817	Willima Koenig - loan	54.72

JULY 1965

2125	Sabbattino & Todarelli re: D. Silverman legal	500.00
2150	Herman J. Frigand - organizing expense	200.00
2172	" " " "	175.00

AUGUST 1965

2176	Black Angus	25.37
2200	Clev. Backster	275.00
2243	Herman Frigand - organizing expense	150.00
2273	" " " "	85.00
2280	" " " "	100.00
2293	Max Sanches, Jr. - organizing expense	50.00
2304	Leon Pastor - loan	300.00
2305	Dana Hoffman - organizing expense	125.00

SEPTEMBER 1965

2367	Dana Hoffman - organizing expense	125.00
2366	Max G. Sanches, Jr. - organizing expense	50.00
2396	" " " "	50.00
2397	Dana Hoffman - Organizing expense	125.00
2400	M. Silverman - Trip Onconda	95.00
2428	James Merritt - organizing expense	60.00

OCTOBER 1965

Check #	Payee	Amount
2458	Dismas House Benefit	300.00
2463	Daniel Williams - organizing expense	90.00
2479	James Merritt - organizing expense	60.00
2485	Henry Steinberg - contr.	66.00
2544	N.Y. Telephone - M. Silverman	14.49
2545	N.Y. Telephone - M. Silverman	48.60

(loans to 1614 & others)

NOVEMBER 1965

2685	N.E. Life Ins. Co. - Pavlo	261.45
2686	N.E. Life Ins. Co. - Miller	178.50
2687	N.E. Life Ins. Co. - Planetta	249.95
2688	N.E. Life Ins. Co. - Vadonic	297.85
2689	N.E. Life Ins. Co. - Spano	167.10
2719A	Henry Brickman - loan	1,203.75

DECEMBER 1965

2728	Bernard Hendrickson - loan	40.00
2729	Joseph DeCampo - loan	40.00
2740	N.Y. University Medical Center - Medical Milton Finn	716.40
2746	Milton Silverman - Xmas gifts	2,000.00
2960	Milton Silverman - loan	2,000.00

COMMENTS:

I would check every one of the loans which have been made to see whether these loans have been repaid. I think it is not a good practice to make loans without a charge of interest which the money could earn in a savings bank, unless there is special reason for that purpose.

The organizing expenses are those apparently authorized by Milton Silverman because there is no action by the Executive Board with respect to these payments. From the Union point of view they are organizing expenses but actually they are paid to the individuals to cover salary and whatever expenses he may have. It is my understanding that this money was not expended by the various persons who received it for organizing work. While they may have spent some of it, it can be assumed that most of the payment constituted a salary or compensation to them for organizing work. The President has a right to authorize this payment in these sums but it is apparent that they do not constitute a reimbursement for organizing work because then they would certainly not all be in rounded figures as they appear from the records.

There are a numberof payments to Black Angus Restaurant. I assume these involved conferences by the President of the Local Union engaged in Union business and that bills from this Restaurant are on file.

There are numerous expenses for testimonial dinners, especially one for Provenzano in the sum of $500.00. This can well be justified because he was an International

Vice President at the time of the dinner and the Union certainly had a right to attend and honor an International Vice President.

There are a number of loans made to Local 1614 and I do not know the background of the loans but they should have been made on an interest-bearing basis.

Re: Frank D'Ambrosia - these are charged to organizing expenses and actually they constitute reimbursement for services rendered by Mr. D'Ambrosia in certain organizing work.

Monte Cristo Cigar Company was paid $130.00 and they are payment for cigars and you might have some explanation for this item.

There is a payment in July 1965 to Sabbattino & Todarelli as a legal fee for D. Silverman in the sum of $500.00. Were these services in connection with a Union matter?

There are checks made out to Dismas House Benefit and Iam wondering what this had to do with a Union purpose.

There were a number of checks made out to M. Silverman as reimbursement for use of telephone.

There is a loan made in November 1965 to Henry

Brickman in the sum of $1,203.75 and no approval appears in the Executive Board minutes.

There is a loan to Milton Silverman in December 1965 and there is no approval of this loan by the Executive Board.

There is a payment of $2,000 to Mr. Silverman in December 1965 for Christmas gifts and this requires an accounting of where the money was spent.

There is a payment to New York University Medical Center on account of illness of Milton Finn in the sum of $716.40 and it might be well to look into this situation.

The above matters must be considered in conjunction with Section 501(a) of Landrum-Griffin bill which provides as follows:

> "Section 501.(a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylawsand any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organizations as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding

or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy."

FRIEDLAND, SCHNEIDER & FRIEDLAND

BY: _____

JACOB FRIEDLAND
A Member of the Firm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

MILTON SILVERMAN,

Petitioner

vs.

UNITED STATES OF AMERICA

----------X

AFFIDAVIT

68 Cr 762

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MAX G. SANCHEZ, being duly sworn, deposes and says:

1. I am Vice-President of Local 810, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, a Trustee of the Health and Welfare Fund of the Union, and have been actively associated with the Union for over twenty-six years and with the welfare fund since it was first established. I am fully familiar with the facts and circumstances in this matter.

2. On February 27, 1967, Grand Jury subpoenas were served upon the Union requiring the production of Union records and documents. The subpoenas were returnable on or about March 6, 1967.

3. Conforming to our Union policy, dealing with legal matters, the matters involved with the subpoenas including the legal obligations, scope and manner of compliance were referred to counsel for the Union, attorney JACK FRIEDLAND of the firm of FRIEDLAND, SCHNEIDER & FRIEDLAND.

4. JACOB FRIEDLAND, whom I knew as Jack Friedland, submitted his confidential report of his examination of the Local 810 records dated May 3, 1967. After the report was

submitted but before the Executive Board minutes were delivered pursuant to the subpoena, Mr. Friedland questioned both Sophie Oschak and me if the Executive Board, at its December 1965 meeting, had in fact approved a loan to Milton Silverman of $2,000. and an allowance to Mr. Silverman of $2,000. for Christmas gifts. We told him that the Executive Board members had voted approval of those items. Mr. Friedland said that he thought the minutes of that meeting did not clearly show such approval.

5. Mr. Friedland thereafter told Sophie and me that the minutes should be changed to reflect the approval given to the loan and gratuities. As the Local's attorney, he told us that these changes were proper. Herman Brickman, Esq., who had been conferring with Mr. Friedland about the White Lamp strike was also present during this conversation. Friedland told us that changes were frequently made in union minutes to reflect what actually happened at meetings and that this made the records more accurate. During this conversation, Mr. Friedland handed Sophie a piece of paper and told her that the first page of the December 1965 Executive Board minutes should be retyped and the paragraph on the slip of paper substituted in place of the last paragraph. I worked with Sophie Oschak to accomplish this clarification and I pulled the first page of the minutes as typed from the minute book, handed it to Sophie Oschak so she could typewrite a new first page and comply with the directions of the Union attorney. I have recently looked at the page numbered 21 of those minutes and the last paragraph is the same as that on the piece of paper handed to Sophie by Mr. Friedland.

6. The last paragraph of the minutes as changed is not written the way Sophie would have prepared minutes as she did for many years past. She had been the recording Secretary of the Executive Board for many years and she always used "Brother" instead of "Mr." when referring to Milton Silverman and other members of the Executive Board.

7. Since the beginning of the investigation of Local 810 which resulted in the indictment of MILTON SILVERMAN, everyone connected with the Union who was subpoenaed by the government was told that the investigation related to embezzlement and misappropriation of Union funds and other criminal offenses. We appeared in groups to testify before the Grand Jury, and the groups subpoenaed, including myself, were repeatedly warned that we were the targets of the investigation which could result in our indictment by the Grand Jury.

8. I made three appearances before the Grand Jury in 1967 and two appearances in 1968. I was subpoenaed for additional appearances which were adjourned sine die by the United States Attorney. The proceedings were always kept pending. I felt this was a constant threat of prosecution by the government and I was so advised. I was always afraid that I might be prosecuted or indicted although I knew of no wrongdoing. For this reason, and upon the advice of counsel, I refused to testify before the Grand Jury and was unwilling to discuss these events with anyone.

I did not learn until recently how Mr. Friedland had testified at the trial, how he purposely concealed his own acts and wrongdoing and I then realized that I should come forward

to correct the injustice to Mr. Silverman.

9. Mr. Silverman was not present at any of the conversations between Sophie, myself and Mr. Friedland about the minutes.

Max G. Sanchez

Max G. Sanchez

Sworn to before me this

12 day of June, 1975

Cecilia Popick

CECILIA POPICK
NOTARY PUBLIC, State of New York
No. 41-4603653
Qualified in Queens County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

MILTON SILVERMAN, :

Petitioner : AFFIDAVIT

vs. : 68 Cr 762

UNITED STATES OF AMERICA :

- X

STATE OF NEW YORK)
: ss.:
COUNTY OF New York)

HERMAN BRICKMAN, being duly sworn deposes and says:

1. I am an attorney and have been admitted to practice in the State of New York many years. Now semi-retired, I have been active in industrial relations. For over thirty years, I have served as an impartial arbitrator, chairman, mediator and arbitrator, usually in connection with industry-wide agreements. During World War II, I served as a public representative on the Tri-Partite Panels of the War Labor Board in the New York metropolitan area and was designated chairman.

2. I have never been associated with Milton Silverman and first came in contact with Local 810, International Brotherhood of Teamsters in connection with the events related hereinafter. Milton Silverman was not present at any time during the events I am about to describe.

3. In 1967, there was a dispute between a firm called White Lamps, in Englewood, N.J., and Local 810. There was a strike and picketing. The management of White Lamps asked me to intercede on their behalf and sometime later I became mediator between the parties.

4. In early March of 1967, I met with Jacob

Friedland, an attorney for Local 810, at the Local's former offices on Broadway in Manhattan concerning the White Lamp organizational dispute.

5. While I was there, a man and a woman, who, I later learned, were Max Sanchez and Sophie Oschak, spoke to Jacob Friedland about some changes that were to be made in the Local 810 Executive Board minutes.

6. Mr. Friedland asked them if there had been an actual authorization at the Executive Board meeting for the expenditures and loan that did not appear to be fully reflected in the minutes. Mrs. Oschak and Mr. Sanchez said that there had been. Mr. Friedland then said that the minutes should be changed to reflect that decision.

7. As I knew from my long experience with labor affairs that such changes were often made, since the union people who take minutes at such meetings are rarely parliamentarians, I told Mrs. Oschak and Mr. Sanchez that it was proper to make such changes in minutes to fully reflect what decisions had been made at a meeting.

8. I did not know at the time that the Executive Board minutes were under subpoena by the United States Attorney's office for presentation to a grand jury. I also did not know that Milton Silverman or anyone in connection with the Local were under criminal investigation.

9. It was only years later, long after the trial of Milton Silverman, when I was at the Local's new offices on 15th Street on another matter, that I heard a discussion by, I believe, some attorneys, of the testimony of Jacob Friedland at the trial of Milton Silverman. (I did not know that Mr. Friedland had testified, nor, indeed of the

trial until I read about it in the newspapers.) That discussion caused me to remember the events which I have just related and I told them about my conversation concerning the change in the Executive Board minutes.

HERMAN BRUCKMAN

Sworn to before me this
29th day of April, 1975.

Notary Public, State of New York
Qualified in [illegible] County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

MILTON SILVERMAN, :

Petitioner : AFFIDAVIT

vs. : 68 Cr 762

UNITED STATES OF AMERICA :

- x

STATE OF NEW YORK)
: ss. :
COUNTY OF NEW YORK)

LAWRENCE COHEN, being duly sworn deposes and says:

1. I reside at 10 Cohill Road, Valley Stream, N. Y. I am a graduate engineer and was project engineer for Reader-Green Construction Co. from 1956 until the firm dissolved in late 1966.

2. As part of my duties with Reader-Green, I was in charge of supervising and expediting that firm's contract with the United Metal & Machine Health and Welfare Fund for the demolition of existing premises and construction of a Medical Center at 10 East 15th St., New York City. I hired Mr. Paul Chlystun as the job superintendent on that project.

3. Reader-Green Corporation had subcontracted the heating, ventilation and air-conditioning work to the firm of Morrison & McCarthy, with a provision that all demolition and scrap removal, other than rubbish removal was the work contracted for by the subcontractors, Morrison & McCarthy.

4. Section 49 of the Heating and Ventilation Specifications of Reader-Green's contract with Morrison & McCarthy provided:

"49. DEMOLITION, REMOVALS AND RELOCATIONS

(a) This Contractor shall perform all necessary demolition, removals and relocations for preparation of the existing building to receive the new work.

* * *

(c) Remove all existing ductwork, fans, baseboard radiation, air conditioning units, air handling units, unit heaters and thermostat from the Cellar and First Floor plus all other items not indicated to remain or is otherwise required for operation of the completed work of this alteration."

Under that provision, the air conditioning equipment having been designated scrap for removal, title to the scrap was necessarily in the subcontractor required to remove the scrap. Any money obtained for the scrap belonged to the subcontractor, Morrison & McCarthy. The custom in this industry is recognized in every situation of this kind. The contractor required to remove scrap is the legal owner and can pass title thereto.

5. During the work on the Medical Center job, Paul Chlystun called me to ask about the removal of the old air conditioning equipment, which was scrap interferring with the job. I told him to contact Morrison & McCarthy since it was their responsibility under the contract to get rid of it. He said he would and later called to tell me that he had spoken to Irving Marcus, one of the principals of Morrison & McCarthy, who had said he would have it removed and disposed of. I did not call Mr. Milton Silverman or anyone else at the Welfare Fund about removal of the air conditioning units since it was Morrison & McCarthy which had the responsibility under the contract for removing and disposing of material in the way of our work which had not been designated for retention or repair by the building owner as they had not been, and upon that

responsibility followed ownership. I, of course, did not ask Paul Chylstun to make such a call to Mr. Silverman nor to my knowledge did he do so.

6. At no time did Paul Chlystun inform me that the junk dealer who removed the air conditioning units paid Chlystun or Marcus $1,000 or any amount of money for removal of the units or anything else from the building. Paul Chlystun merely reported to me that the units had been removed.

7. I also instructed Paul Chlystun to have a conveyor removed since it was in the way of construction. The junk dealer, who I am informed was the same one who removed the air conditioners, to my knowledge, made no payment to anyone for the conveyor.

8. As a result of Morrison & McCarthy's inability to complete their contract and other problems with the Welfare Fund job Reader-Greene became insolvent late in 1966 and the project was taken over by the bonding company.

9. Later when I was supervising a project in Monticello for Reader-Greene, I believe in 1967, I was interviewed by an F.B.I. agent about Milton Silverman. The only subject of his questioning was work Reader-Green had done on Milton Silverman's home at about the same time as the Welfare Fund project. When I told the agent that Mr. Silverman had paid for the work with his personal check, the interview ended. The agent asked me no questions about any payments for any items removed from the Welfare Fund job and, not knowing of any myself, I did not realize it was an issue. The agent, in fact, asked me no questions having to do with performance on the job or ownership of removed items although he did know I was the project engineer.

10. I lost contact with Paul Chlystun after Reader-Green foundered. I did not know what the nature of his testimony was at the trial until it was shown to me recently.

LAWRENCE COHEN

Sworn to before me this

20 day of May, 1975

CECILIA POPICK
NOTARY PUBLIC, State of New York
No. 41-4603653
Qualified in Queens County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

MILTON SILVERMAN, :

Petitioner :

VS. :

UNITED STATES OF AMERICA :

- X

AFFIDAVIT

68 Cr 762

STATE OF NEW YORK)
: ss.:
COUNTY OF NASSAU)

ROBERT M. BLAKEMAN, being duly sworn, deposes and says:

1. I am an attorney, licensed to practice in the State of New York.

2. For many years, I represented Reader-Greene Corp. and other firms functioning as general contractors. In particular, I drafted the general and sub-contracts in connection with the demolition and construction of premises at 10 E. 15th Street, New York City, for the United Wire, Metal, Machine, Health and Welfare Fund. I am fully conversant with the meaning of the terms of such contracts and the trade usages in connection with such work.

3. I am informed that Mr. Milton Silverman was charged with - and convicted of - coverting the scrap value of air conditioning units on the aforementioned job on the theory that these units were the property of the Welfare Fund. I can state unequivocally that those units by contract and trade usage were the property of the contractor whose responsibility it was to remove those units, in this case Morrison & McCarthy, the heating, ventilating and air conditioning sub-contractors.

4. The Agreement, dated April 6, 1966, between the owner (the Fund) and the contractor (Reader-Greene Construction Corp.) which incorporates by reference the Specifications of the job, corroborates this title to the air-conditioners. Article I of the Agreement, entitled "Scope of the Work", requires the contractor to do everything described in the Specifications. Section 46(j) of the Specifications requires the contractor to "remove or relocate all existing equipment, piping or ductwork as required to accommodate the work of this alteration at no extra cost to the owner." Section 49(b) of the Specifications provides that "no extra charges will be allowed for any removals or relocations necessary." And Section 49(c) provides that "removal shall include taking from the premises and disposal of removed items." This last section goes on to provide that, with respect to items which the owner wishes to retain, these items "shall be cleaned and placed in good repair." Therefore the cutting up and removal of the air-conditioning units was predicated on the contractor's knowledge that the owner had not excepted them from the contract, otherwise the unit would have been "cleaned and placed in good repair." Consistent with Section 49(c) is the proposition that removal and disposition of items is not only the contractor's obligation but also either his additional burden or possible profit.

5. By Agreement dated May 13, 1966, Reader-Greene sub-contracted all heating and ventilation work to Morrison & McCarthy, Inc., whose president was Irving Marcus. The sub-contract delegates to Morrison & McCarthy the obligation under the Contract and Specifications respecting heating and ventilation. Therefore, the removal of the

air-conditioner became the delegated responsibility of the sub-contractor, who also acquired ownership rights under the custom and usage attached to its disposal as well as under the contract.

6. Neither I, nor, to my knowledge, Mr. George Greenberg, President of Reader-Greene, nor anyone else at Reader-Greene were contacted by any officer or agent of the government concerning the ownership of the air conditioning units or any other material removed in the course of the demolition and reconstruction of the Welfare Fund building.

Sworn to before me this
3rd day of June 1975.

EDYTHE BARLANGA
Notary Public, State of New York
No. 30-4624610
Qualified in Nassau County
Commission Expires March 30, 19 77

18 E. 15th Street
New York, N. Y.

Agreement

SUBCONTRACT NO. N.C. #32

THIS SUBCONTRACT made this 13th day of May, 1966, between READER-GREEN CONSTRUCTION CORP., a New York Corporation, having its principal place of business at 311 Meacham Ave., Elmont, N. Y., hereinafter called the Contractor, and

an individual trading as MORRISON & McCARTHY, INC.

a partnership consisting of

a corporation organized under the laws of the State of New York

with main office at 73 Chasner Street, Hempstead, N. Y.

hereinafter called the Subcontractor.

IN CONSIDERATION of the premises and conditions herein contained the parties hereto mutually agree as follows:

1. The Subcontractor acknowledges that he has carefully examined the "principal" contract, No. General Construction awarded to the Contractor by United Wire, Metal, Machine Health & Welfare Fund, hereinafter designated as the Owner, and that he is fully familiar with the terms thereof as said terms pertain to the work sublet hereunder. Said principal contract shall be considered a part hereof and in the event of any conflict between said principal contract and this subcontract, this subcontract shall control.

2. The Contractor sublets the following parts of work of said principal contract to the Subcontractor, and the Contractor agrees to pay or cause to be paid to the Subcontractor for the performance of said work, and the Subcontractor agrees to accept in full payment therefor the following prices: (Subject to authorized additions and deductions as herein provided).

This Subcontractor shall furnish all labor, materials, equipment, scaffolding and related items to completely furnish and install all heating, ventilating and air conditioning work, all in accordance with the plans, specifications and addendums. This Subcontractor shall submit all required shop drawings, materials and related items for approval before fabrication or installation of his work. This Subcontractor shall obtain all required permits, licenses, etc., regarding his work. This Subcontractor shall provide no excavation or backfill, temporary heat or patching. This Subcontractor shall fully cooperate with all related subcontractors regarding the removal and/or installation of his work. This Subcontractor shall furnish maintenance for the ~~foregoing~~ his contract, ~~which~~ as ~~is~~ required by the General Contractor.

CONTRACT PRICE: $108,000.00 (One Hundred Eight Thousand Dollars).

PAYMENTS: Subject to the approval of the Architect, payment for 90% of the value of the work installed during any calendar month shall be due and payable on or before the 20th day of the month following. All remaining retained percentages shall be in accordance with the Architect's specifications.

The foregoing prices are to be in full for all materials furnished and labor and services performed hereunder. No portion of the final payment shall be paid to the Subcontractor until thirty (30) days after the Subcontractor has completed all its work hereunder, and the same has been duly accepted by the Owner, and the Contractor has received its final payment from the Owner for the work performed by the Subcontractor hereunder. All moneys withheld as security under the principal contract for the work performed by the Subcontractor shall be similarly withheld by the Contractor from the Subcontractor.

3. The Subcontractor agrees to be bound by, conform to and comply with the terms of the principal contract concerning the work hereunder. The Subcontractor shall perform its work hereunder pursuant to the progress schedule in the principal contract, or any modification thereof, and shall at all times coordinate its work with the Contractor and with other Subcontractors without any claim against the Contractor for any deviations from said progress schedule.

4. The Subcontractor at its own expense shall obtain all necessary licenses and permits and comply with the laws, regulations and codes of the Governmental authorities having jurisdiction over the work hereunder; all taxes present and future, Federal, State or local, on any materials or services furnished by the Subcontractor shall be paid by the Subcontractor.

5. The Subcontractor shall not employ men or means, or use materials, which may cause labor disputes, and shall conform to the labor policies of the Contractor, and in the event the performance of the work hereunder is prevented or hampered by such labor disputes or disturbances the Contractor may terminate his subcontract and shall pay the Subcontractor the reasonable value of the work performed and the materials furnished up to the time of termination; provided, however, that if any of the foregoing were occasioned by or contributed to by acts or omissions of the Subcontractor the Subcontractor shall be deemed to have breached this contract and shall be liable for the damages sustained thereby to the Contractor.

6. Prior to commencing work hereunder the Subcontractor shall furnish to the Contractor Certificates of Workmen's Compensation Insurance and Public Liability Insurance, and such other insurance as may be required by law, in form satisfactory to the Contractor. Said liability insurance shall be in the minimum amount of $ 100,000.00 for injury or death of one person, and $ 300,000.00 for injury or death of more than one person, and $ 100,000.00 for property damage, in any one accident.

BEST COPY AVAILABLE

7. The Subcontractor agrees to do all these things reasonably to be implied as necessary for the completion of the work sublet herein. The Subcontractor shall make no claim for extra work unless such extra work was performed pursuant to a written order therefor signed by the Contractor.

8. Changes in the plans and specifications, including extra work orders, under the principal contract shall be incorporated herein and the Subcontractor shall accept the sum allowed the Contractor by the Owner therefor, exclusive of the Contractor's percentage thereon, in full satisfaction of any increased cost of performance of any subcontractor occasioned by said changes or extra work orders, and if such changes cause a decrease in the cost or time of doing the work hereunder, the Subcontractor similarly shall accept the determination of the Owner as to the amount of the said decrease. No claims for increased compensation shall be made because of increases in the price of labor or materials, delays or interferences by the Contractor, subcontractors, the Owner or other contractors, or for any cause whatsoever. If the Contractor orders changes in the work not predicated on a similar order from the Owner, the contract price shall be adjusted in the manner as provided in the principal contract were the Owner to order such work.

9. All payments received by the Subcontractor hereunder shall be held by it as trust funds for the payment of labor, materials, services and all other charges in connection with the performance of the work hereunder, and shall not be applied to other purposes until such obligations are satisfied.

The Contractor may if it so elects require a Subcontractor as a condition precedent to receiving any partial or final payment to submit evidence satisfactory to the Contractor and to submit verified statements that no unpaid claims exist against the Subcontractor for labor, services, materials, insurance or other obligations incurred by the Subcontractor in the performance of its work, and the Contractor is authorized at its election to withhold an amount equal to the unpaid claims and to pay same for the account of the Subcontractor and deduct said amounts from the money due the said Subcontractor.

The acceptance by the Subcontractor of the payment designated the final payment, which shall be made prior to the return of any sums held as security hereunder, shall operate as a general release to the Contractor of all claims of the Subcontractor and all liability of the Contractor in connection with any of the work done hereunder.

9. No liens of whatever nature shall be filed by the Subcontractor against the buildings or improvements or the moneys due or to become due the Contractor in connection with the work to be performed by the Subcontractor hereunder.

The Subcontractor shall hold the Contractor harmless and indemnify the Contractor against all debts, claims or demands for materials, labor, equipment, liens, attachments, garnishment liens, claims for damages for whatever reason arising out of this subcontract, and agrees to reimburse the Contractor for any expenses, including attorney's fees, incurred by the Contractor in connection therewith and the Contractor is authorized to withhold payment to the Subcontractor for his failure to comply herewith.

The Subcontractor agrees to indemnify and save harmless the Owner and General Contractor against loss or expense by reason of the liability imposed by law upon the Owner or General Contractor for damage because of bodily injuries including death at any time resulting therefrom sustained by:

Any employee of the Subcontractor engaged in the performance of their work, howsoever caused, including such injuries to such employees due to the negligence of the Owner, General Contractor or Subcontractor, or any or all of them, whether due to a breach of statutory duty or administrative regulation or otherwise.

10. The Contractor is in no way responsible for the loss of materials or for injury to the work performed by the Subcontractor due to any cause whatsoever until after completion and final acceptance of the Subcontractor's work hereunder and in no event at any time shall the Contractor be responsible for equipment of the said Subcontractor.

The Subcontractor shall take all steps necessary to protect its work, equipment and materials and shall remove its materials and equipment within ten (10) days after completion of its work and leave the premises broom clean.

11. In the event that the work herein is not commenced or prosecuted as provided herein, or in the event that any provision of the Bankruptcy Act or any Insolvency Act is invoked by or against the Subcontractor, or the Subcontractor makes an assignment for the benefit of creditors or a receiver be appointed or execution of a judgment issued on giving the Subcontractor two (2) days written notice, the Contractor can terminate this Subcontract and do what is necessary to complete the work herein, charging the cost of completion against the moneys due or to become due the Subcontractor, in addition to any other damage the Contractor may sustain.

12. Cancellation of the principal contract shall be deemed a cancellation and termination of this Subcontract.

13. The Subcontractor shall at its own expense procure and furnish to the Contractor upon written demand a bond in the penal sum of the Subcontract, guaranteeing the faithful performance of this Subcontract by the Subcontractor, and a labor and material bond guaranteeing the prompt payment of moneys due to all persons supplying the Subcontractor with labor and materials employed and used in carrying out this Subcontract. Said performance and payment bonds shall be in such form and given by such surety company or companies as are acceptable to the Contractor, and shall contain provisions that extensions of time or other forbearance by the Contractor shall not operate to discharge either the Subcontractor or the surety, and that no right of action shall accrue on this bond to any other person or corporation other than the Contractor, its successors or assigns. Failure to furnish said bond within five (5) days after such demand shall be deemed a breach of this Subcontract entitling the Contractor at its election to terminate this Subcontract, and that upon such termination the Subcontractor shall be entitled to no further compensation or moneys whatsoever, regardless of the value of the work already performed or amounts paid prior to said termination.

14. This Subcontract or the moneys due hereunder shall not be assigned, nor shall the Subcontract be sublet either in whole or in part, without the prior written consent of the Contractor. Any such attempted assignment or subletting without such prior written consent shall be of no force and effect and shall entitle the Contractor, at its election, to terminate this Subcontract and to treat the same as a violation of an essential term hereof.

15. This Subcontract is binding on the heirs, executors, administrators, successors and assigns of the parties hereto.

16. This contract comprises the entire agreement of the parties and cannot be changed, modified, or discharged orally, but only by a writing signed by the party sought to be charged.

17. The provisions of this Subcontract and the rights of the parties hereto shall be construed pursuant to the Laws of the State of New York.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement the day and year first above written.

BRADER-GREEN CONSTRUCTION CO., INC.
Contractor

MORRISON & McCARTHY, INC.
Subcontractor

SPECIFICATIONS FOR HEATING, VENTILATING, AND AIR CONDITIONING WORK

1. GENERAL CONDITIONS

The General Conditions and Special General Conditions are hereby made a part of the Specifications for heating, ventilating and air conditioning work.

2. NOTICE TO BIDDERS

Before submitting a proposal, each bidder shall:

(a) Examine drawings relating to work of all trades and become fully informed as to extent and character of work required and its relation to all other work in project.

(b) Examine site for proposed work and determine all conditions that may affect work embraced in proposal.

(c) No consideration or allowance will be granted for failure to visit site, or for any alleged misunderstanding of materials to be furnished, or work to be done; it being understood that tender of proposal carries with it agreement to items and conditions referred to herein or indicated on aforementioned drawings.

(d) Contractor's attention is called to the fact that the work of this Contract consists of work in, and alteration to, an existing building. All removals, relocations, etc., required for work in the existing building are a part of this section of the Specifications.

3. INTENT

(a) Intent of specifications and drawings is to cover an installation complete in every respect. It is not intended to give every detail on drawings and in specifications. Owner will not be responsible for absence of any detail Contractor may require, nor for any special construction which may be found necessary as work progresses. If an item is either indicated or specified, it shall be considered sufficient for inclusion of said item Contract. Contractor shall furnish and install material and equipment usually furnished with such systems and/or needed to make complete operating installation, whether mentioned or not, omitting only such parts as are specifically excepted.

(b) Architect's interpretation of drawings and specifications shall be final and binding upon Contractor.

(c) With submission of bid, give written notice to Architect of any materials or apparatus believed inadequate or unsuitable, in violation of laws or ordinances, rules or regulations of Authorities having jurisdiction, and any necessary items of work omitted. In absence of such written notice it shall be mutually agreed that Contractor has included cost of all items in his proposal, and that he will be responsible for satisfactory functioning and approval of entire system without extra compensation.

4. SURVEYS AND MEASUREMENTS

(a) Contractor shall base all measurements, both horizontal and vertical, from bench marks established by others and shall be responsible for correct setting out of work as indicated, to agree with these established lines and levels.

(b) Contractor shall verify all measurements of his own or others at site, and shall be responsible for correctness of same as related to his work.

(c) Should Contractor discover any discrepancy between actual measurements and those indicated, he shall notify Architect in writing and shall not proceed with his work until he has received written instructions from Architect. No extra charge or compensation will be allowed on account of differences between actual dimensions and those indicated.

5. WORKMANSHIP

Highest grade of workmanship will be required. If Architect considers any work to be inferior, Contractor shall replace same with first-class work without additional charge.

6. DRAWINGS

(a) Drawings are diagrammatic and indicate general arrangement of systems and work included in Contract. Consult Architectural Drawings and Details for exact location of fixtures and equipment, and where not definitely indicated, request this information from Architect in writing.

(b) Follow drawings in laying out work and check drawings of other trades relating to work to verify spaces in which work will be installed, and maintain maximum headroom and space conditions at all points.

7. RIGHTS RESERVED

Drawings and specifications determine general arrangement and locations of equipment and work of various systems, Contractor shall, with approval of Architect and without extra charge, make reasonable modifications in layout needed to prevent conflicts with work of other trades or for proper execution of work.

8. ACCESSIBILITY

Install work so as to be readily accessible for operation, maintenance, and repair. Minor deviations from drawings may be made to accomplish this, but changes of magnitude or which involve extra cost shall not be made without approval.

9. CONFLICTS

Should it appear that there is real or apparent discrepancy between drawings and specifications, between different sections of specifications, or between different drawings or parts thereof, concerning nature, quality or extent of work to be furnished, it shall be assumed that Contractor has based bid on doing work in more expensive manner. Final decision as to how work shall be installed will rest with Architect.

10. APPROVALS

(a) Materials, workmanship, design, and arrangement of work shall be subject to approval. A list of proposed manufacturers for the various equipment and products to be installed must be submitted with the bid for the work included under this section of the Specifications. Owner retains the right to require installation of manufacturer or any one of the several manufacturers called for or noted in the plans and specifications.

(b) Upon execution of Contract and prior to ordering of material, submit approval a list of all material and equipment proposed for use, in ample time to avoid delay in construction schedule. Intention of using specified materials does not relieve obligation of submitting this list.

(c) Prior to delivery of any material to job site, submit for approval as directed samples, detailed drawings and specifications of material and equipment, with accompanying statement to the effect that they have been examined and comply with specifications. Catalogs, pamphlets, or other documents submitted to describe items on which approval is being requested, shall be specific and identification in catalog, pamphlet, etc., of item submitted shall be clearly made in ink. Data of general nature will not be accepted.

(d) If material or equipment is installed before it is approved, Contractor shall be liable for its removal and replacement at no charge if, in opinion of Architect, material or equipment does not meet intent and requirements of drawings and specifications.

11. COOPERATION WITH OTHER TRADES

(a) Work shall be performed in harmony with other work on project and so scheduled as to allow speedy and efficient completion of project by all trades.

(b) Render full cooperation to other trades and furnish in writing, with copies to Architect, any information necessary to permit work of all trades to be installed satisfactorily and with least possible interference or delay.

(c) Where work of Contractor will be installed in close proximity to work of other trades or where there is evidence that work of Contractor will interfere with work of other trades he shall assist in working out space conditions to make satisfactory adjustment. If Contractor installs work before coordinating with other trades or so as to cause interference with work of other trades, he shall make changes necessary to correct condition without extra charge.

12. CUTTING AND PATCHING

Install all required sleeves, forms, and inserts before walls, partitions, floors, or roofs are built. Cutting and patching of walls, partitions, ceilings, and floors necessary for reception of work, caused by failure to provide or properly locate sleeves, forms and inserts, incorrect location of work, or failure to cooperate with other trades, shall be done at expense of Contractor and in accordance with Union regulations. No cutting of finished or structural work may be done without approval.

13. WATERPROOFING

Where any work pierces waterproofing, installation shall be approved. Furnish all necessary sleeves, caulking, and flashing required to make openings absolutely watertight.

14. PROTECTION

(a) Contractor shall be responsible for work and equipment until finally inspected, tested and accepted. After delivery and before and after installation, protect work against theft, injury or damage. Carefully store material and equipment received on site which are not immediately installed. Close open ends of work with temporary covers or plugs during construction to prevent entry of obstructing material.

(b) Contractor shall protect work and material of all other trades from damage that might be caused by his work or workmen and shall make good all damage thus caused.

15. PERMITS

Pay for and obtain all required permits for work and prepare all documents required to obtain such permits. Deliver photostatic copies of permits and receipts for payment to Architect.

16. CERTIFICATES

(a) Materials, equipment, and installation of work shall be in strict compliance with requirements, in force at time of execution of Contract, of civic authorities having jurisdiction, National Board of Fire Underwriters or Associated Factory Mutual Fire Insurance Companies, as specified, of utility companies furnishing service for installation, and Architect.

(b) Secure complete approval of above-mentioned authorities for work and delivery certificates of approval to Architect before requesting final payment. Pay necessary fees for tests, inspections, and certificates, and prepare any drawings and documents in addition to contract drawings required, in order to secure approval.

17. UNION REGULATIONS

Contractor shall work in harmony with labor unions, and shall be responsible for any delays or damages caused by his failure to do so.

18. GUARANTEE

Contractor shall guarantee, in writing to Owner at signing of Contract, all work installed to be free from any and all defects in workmanship and/or materials and that all apparatus will develop capacities and characteristics specified, and that if, during period of one year from date of certificate of completion and acceptance of work, any such defects in workmanship, material or performance appear, he will remedy them without cost to Owner. Should Contractor fail to remedy such defects within a reasonable length of time, to be specified in notice from Architect, Owner may have such work done and charge cost to Contractor.

19. PATENT GUARANTEE

Contractor shall guarantee Owner and Architect against all costs and losses due to claims, actions, and judgments brought or received against Contractor, Owner, or Architect on account of any violation of letters patent, or patent rights, or any infringement thereof by reason of use of any machine, manufacture, or composition of matter on work in violation of any patent rights or any infringement thereof.

20. INSURANCE

Contractor shall maintain Contractor's Liability Insurance, Contractor's Contingent Liability Insurance, Property Damage Liability and such other forms of Insurance as required to protect him from claims for Workman's Compensation Acts and from other claims for damages for personal injury, including death, as well as property damage which might arise from operations and work under this Contract. Insurance shall be in amounts as required by Architect.

21. TAXES

Contractor shall be responsible for payment of contributions, taxes, or premiums which may be payable or required under State Employment Insurance Acts, or Federal Social Security Act as to employees engaged in performance of work. He shall also be responsible; for payment of sales taxes or other taxes in force or known at time of execution of Contract.

22. SUPERVISION

Contractor shall supply services of an experienced and competent Supervisor who shall be constantly in charge of work at site.

23. RUBBISH

At least once each week, or more often if necessary or directed, remove rubbish from premises.

24. STORAGE

Store materials in spaces designated by Architect.

25. DEFINITIONS

Definitions of terms used herein:

(a) "Furnish" or "provide": To furnish, erect, install and connect up complete and ready for regular operation particular work referred to unless specifically indicated or specified otherwise.

(b) "Piping": Pipe, fittings, flanges, valves, controls, hangers, traps, drains, insulation, and items necessary or required in connection with or relating to such piping.

26. SCOPE OF WORK

(a) The work included under this Section of the Specifications shall consist of furnishing all labor, materials, tools, equipment and appliances, etc., necessary for the installation of all Heating, Ventilating and Air Conditioning Work, complete, as shown on the Drawings and/or as herein specified, and as required for a proper operating system. The work shall consist of, but not necessarily be limited to the following items:

1. Packaged, self-contained multizone air conditioning units.
2. New oil burner.
3. Demolition.
4. Radiators.
5. Cutting.
6. Fans.
7. Pumps.
8. Piping, valves and fittings.
9. Sheet Metal Work.
10. Registers, grilles and diffusers.
11. Insulation.
12. Control systems.
13. Electric wiring, starters and motors.
14. Tests and adjustments.

27. WORK NOT INCLUDED

(a) Painting, except as otherwise included under this Specification.

(b) Patching, except as otherwise included under this Specification.

(c) Power wiring, unless otherwise noted.

(d) Undercutting of doors and louvered doors.

28. MULTI-ZONE AIR CONDITIONING UNIT

(a) Furnish and install two packaged self-contained multi-zone air conditioning units where indicated on the drawings and of size and capacity noted. Units shall be manufactured by Thermal Engineering, or as approved.

(b) Units shall be complete with casing, compressor, cooling coil, heating coil, fans, motors, drives, drive guards, 2" thick high capacity permanent filters, air cooled condenser, zone dampers, controls, and all auxiliaries and appurtenances required for a complete installation and proper operation.

(c) Control panels shall be internally mounted and wired with magnetic starters for both fan and compressor motors, high and low pressure cutouts, air pressure switch and non-recycling control relay for automatic pumpdown. Part winding motor-starter combination shall be supplied for increment starting.

(d) Compressors shall have hot gas bypass system for capacity modulation and to maintain operation under light load conditions from final step of cylinder unloading to zero percent of capacity. Air cooled condensers shall have ambient temperature control for operation with 0°F outside air.

(e) Second Floor unit shall be model MSA-60 with PF-8000 air cooled condenser. Fan shall be rated for 22200 CFM at 3/4" external static pressure with a 15 HP fan motor. Outside air quantity shall be 4000 CFM. Capacities shall be as follows:

1. Cooling capacity shall be not less than 57.1 tons with entering air at 81.1°FDB and 67.0°FWB, and condenser ambient air at 95°F. Coil shall be 6 rows.

2. Heating coil capacity shall be not less than 602000 BTU per hour with 57.3°F entering air and 61 GPM of 200°F entering water at a 20° temperature drop. Coil shall be 1 row.

(f) First Floor unit shall be model MSA-55 with PF-8000 air cooled condenser. Fan shall be rated for 17525 CFM at 3/4" external static pressure with a 15 HP fan motor. Outside air quantity shall be 6000 CFM. Capacities shall be as follows:

1. Cooling capacity shall be not less than 53.0 tons with entering air at 83.8°FDB and 68.6°FWB, and condenser ambient air at 95°F. Coil shall be 5 rows.

2. Heating coil capacity shall be not less than 740000 BTU per hour with 46°F entering air and 74 GPM of 200°F entering water at a 20° temperature drop. Coil shall be 2 rows.

(g) Mount units on 1/2" thick cross ribbed neoprene pads, Shear Flex by Vibration Mountings, or as approved.

29. REFRIGERATION PIPING AND SPECIALTIES

(a) In addition to any refrigeration specialities specified elsewhere herein, furnish and install a complete system of refrigerant piping and refrigeration accessories as hereinafter specified and as required for proper operation of the various systems.

(b) Refrigerant piping shall be type L, hard drawn, with wrought copper sweat fittings. Copper joints shall be soldered with a 95-5 solder.

(c) Furnish and install solenoid valves, strainers, and driers, all properly installed. Accessories shall be full size of the piping in which they are installed except where another size is specifically noted.

(d) All refrigerant specialties shall be Alco or Sporlan.

(e) Entire systems shall be properly evacuated before charging and placing the systems into operation.

(f) Systems shall be tested with a halide torch and all proven free from leaks. Contractor must submit a letter attesting to satisfactory completion of such test and that the entire system is free from leaks.

30. PIPING

(a) Provide complete systems of flow and return, and fuel oil piping as shown on the drawings and as required.

(b) All piping shall be adequately supported with approved hangers so as to prevent any sagging of lines, or any undue stain on pipes or fittings.

(c) All piping work shall be installed with proper provisions to allow for expansion and contraction of lines so as to prevent any undue strains on pipe and fittings, any trapping of lines or lifting or dislocation of any radiators or any other appliances. Contractor will be required to rectify, at his own expense, any conditions of improper or noisy circulation due to trapped or air-bound lines, including the expense of cutting and repairing of building structure incidental to making such alterations. Run piping concealed in finished spaces unless otherwise noted.

(d) All pipe lines shall be capped during construction to prevent entry of dirt or other foreign material.

(e) All connections to equipment shall be made by unions or flanges.

(f) Contractor shall install his work to conform to space conditions and the work of other trades. The drawings indicate generally the runs and sizes of piping and the sizes must not be decreased nor the plans deviated from except as space conditions may require and as approved.

(g) Eccentric fittings shall be used on all mains to secure proper drainage and venting.

(h) Screwed joints shall be made up with soft setting approved pipe compound. No red lead or other such material shall be used.

(i) No bushings shall be used in pipe line fittings.

(j) Pipe for the various systems shall be as follows:

Service	Material
Hot water.	Black steel, schedule 40.
Drain Piping.	Galvanized wrought iron, schedule 40.

31. PIPE FITTINGS

(a) Materials for pipe fittings shall be as follows:

Service	Materials
Hot water.	4" and larger, black 125 lb. flanged fittings, schedule 40. 3" and 2½", black cast iron 125 lb. screwed fittings, or flanged, schedule 40. 2" and under black cast iron 125 lb. screwed. All concealed screwed fittings shall be extra heavy.
Drain piping.	Galvanized malleable iron 150 lb. screwed fittings.

(b) Field fabricated tees, notched tees and fish mouth tees are specifically prohibited.

32. UNIONS

(a) Unions 2" and smaller shall be screwed. Union 2½" and larger shall be flanged.

(b) Screwed unions shall be malleable iron with bronze ground seat suitable for 300 lb. WSP.

(c) Unions shall not be used on piping enclosed in constructions unless specifically permitted.

33. VALVES

(a) Provide valves where shown on the drawings, as specified herein, and where required for proper control of the piping systems.

(b) All valves in furred ceilings shall be arranged to keep the number of access doors to a minimum.

(c) All valves shall be constructed so that they can be packed while in operation, whether open or shut.

(d) All valves, except where specifically noted otherwise, shall be Jenkins, Walworth or Lunkenheimer.

(e) Valves for the various services shall be as specified below. Figure numbers are Jenkins:

1. For flow and return piping: Gate valves, 2½" and larger, O.S. & Y., Fig. 651-A. Gate valves, 2" and under, Fig. 370. Globe valves, Fig. 106-A. Checks valves in discharge of each pump shall be all bronze Smolensky noiseless check valves.

2. Furnish and install all other hand valves, check valves, etc., as required for complete with proper valving of the various systems and component sections thereof.

3. Drain valves with hose ends for hose connections shall be provided at all low points of the water piping systems.

34. THERMOMETERS AND PRESSURE GAUGES

(a) Provide approved separable socket, brass case, 9" scale, best quality mercury stem thermometers. Thermometers shall be adjustable angle pattern as required and shall be set in approved and threaded thermometer well fittings. Thermometers and wells shall be of same size throughout.

(b) Scales for ductwork shall read 0°F. to 110°F., except for fresh air intakes which shall read - 40°F. to 110°F. Thermometers shall be furnished before and after each coil and wherever else called for on the drawings. Scales for piping shall read 100°F. to 250°F.

(c) Furnish and install 4½" diameter bourdon tube pressure gauges in the suction and discharge of each pump, with pigtails and shut off cocks.

(d) Manufacturers shall be Weksler, Marsh, Foxboro or U.S. Gauge Co..

35. STRAINERS

(a) Furnish and install approved strainers in the inlet connection to each temperature control valves, and at the suction of each pump. All strainers shall be Y pattern with cast iron or bronze bodies of ample strength for the pressure to which they shall be subjected, have removable cylindrical screens of brass or stainless steel and suitable flanges or tapping to connect with the piping in which they are installed.

(b) Strainers shall be set in horizontal or vertical downward run of pipe arranged not to trap the piping.

(c) Strainers shall be full size of pipe line in which they are installed.

(d) Strainers shall be Sarco, or as approved.

36. HANGERS, SUPPORTS AND ANCHORS

(a) Furnish and install hangers, supports and anchors as hereinafter specified and as required.

(b) All horizontal runs of piping shall be supported by clevis hangers.

(c) Spacing for hangers shall be in accordance with the following schedule:

Pipe Size	Minimum Rod. Diam.	Spacing
Up to 1¼"	3/8"	5'-0"
1½" and 2"	1/2"	7'-0"
2½" and 3"	5/8"	8'-0"
4" and larger	3/4"	12'-0"

(d) In no case will piping be permitted to hang from or be supported by other piping, pumps or equipment. Strap hangers will not be permitted.

(e) Hangers and supports shall be Grinnell, Carpenter & Patterson, or as approved.

37. SLEEVES AND ESCUTCHEONS

(a) Risers, radiator branches, etc., coming through concrete or masonry shall have sleeves of sufficient diameter to take the pipe covering.

(b) Sleeves shall be 24 gage galvanized iron, except where otherwise noted. All sleeves shall be set flush with the finished floors and walls.

(c) All piping through floors and exposed to view, shall have escutcheons at the finished floors and ceilings. All escutcheons shall be cast brass with chromium plate over nickel plate and shall be held in place by set screw. Escutcheons at floor shall be bell shaped to fit pipe sleeves. All details of escutcheon plates as to size, shape, finish, etc., shall be subject to approval by the Architect.

(d) Piping coming out of partitions or furring shall have escutcheons.

(e) Any piping passing through waterproof floors shall be provided with waterproof flashings so as to avoid leakage at those points. The sleeves shall be schedule 40 black steel pipe with the space between the piping and the sleeve packed with oakum and caulked with lead. All details must have prior approval of the Architect.

38. SHEET METAL WORK

(a) Ductwork:

1. Furnish and install all required ductwork, for the air-conditioning systems, exhaust systems, and for future air-conditioning, all as shown on the drawings.

2. Ducts shall be run and equipment located as to clear interferences in the field. Where necessary, the Contractor shall make such changes in elevation, location, size and run to clear all interferences without effecting air quantities, distribution, quietness and satisfactory clearance. Such changes shall be approved by the Architect before the work is started. The Contractor shall refer to the drawings of Architectural, Structural, Plumbing and Electrical Contracts for location of hung ceilings, lights, piping, etc., to assure proper location of ducts.

3. Duct elbows shall have a center line radius of one and one-half times the dimension of the duct in the place of the bend. Square elbows and turning vanes shall be used where indicated or where the center line radius is less than minimum specified above. Turning vanes shall be "Ducturn" as manufactured by Tuttle & Bailey, or as approved.

4. No pipe, conduit and/or hanger for ceiling or piping shall pass through ducts unless it is impossible to avoid doing so and not unless approval of the Architect is received. Where conditions permit, pipe, conduit or hanger passing through a duct shall be enclosed in a metal deflector so installed as to be air tight and reduce resistance. Design of the deflector shall be submitted to the Architect for approval. Should pipe, conduit, or hanger be required to pass through any duct, and approval is given the Architect for same, this Contractor shall furnish any and all deflectors required.

5. All ducts shall be straight and smooth on the inside with neatly finished joints. Slip joints shall be used in the direction of air flow. Ducts shall be securely supported in approved manner and shall be so constructed and installed as to be free from vibration under all operating conditions.

6. Horizontal ducts shall be hung rigidly with the distance between supports not exceeding 4'-0". Vertical ducts shall be supported at each floor. All ducts over 25" in the larger dimension shall be supported or braced in addition to such supports and bracing hereinafter specified in order to completely eliminate any sagging whatsoever. Such method of support and bracing shall be in an approved manner. All ducts from 24" up to and including 60" in the larger dimension shall be cross-broken.

MILTON SILVERMAN participated in the authorship of the

7. Ducts shall be fabricated of galvanized steel, except where otherwise noted, of gages listed below:

Greater Dimension of Rectangular Duct	Duct Thickness U.S.S. Gage Number	Galvanized Iron Hangers	Galvanized Iron Angle Stiffeners for Duct Sections
Up to 10"	26	Strap 1" x 1/8"	- - -
11" to 24"	24	" "	- - -
25" to 30"	24	" "	1" x 1" x 1/8" angles
31" to 40"	22	" "	" " " "
41" to 60"	22	" "	1½" x 1½" x 1/8" angles
61" and over	20	1" x 1" x 1/8" angles	" " " "

8. All connections between ducts, or ducts and equipment, of dissimilar metals shall be provided with a non-conductive gasket to prevent contact between dissimilar metals.

10. Fresh air ducts shall be of 24 ounce copper with all joints soldered. Goosenecks shall also be 24 ounce copper.

11. Where copper is specified, 16 gage aluminum may be used in lieu of copper. Supports for copper or aluminum ducts shall also be copper or aluminum, whichever duct material is used.

(b) Dampers:

1. All dampers operated by automatic controls shall be of the louvered type with brass bearings and mounted in rigidframes. Damper blades shall be No. 16 gage and not more than 10" wide.

2. Fusible link fire dampers shall be provided where any duct pierces floors, vertical shafts, and wherever else local authorities require the installation of fire dampers. Fire dampers of the hinged type shall be made of 1/4" steel with corrosion resistant bearings and conform to the requirements of local authorities.

3. Volume control dampers shall be of the single leaf, pan type of not less than 26 gage and installed to assure freedom from vibration. All dampers shall be equipped with approved position indicators and locking devices. Duct at damper shall be reinforced as required to prevent vibration. Hardware to be Duro Dyne, or as approved.

(c) Flexible Connections:

All connections to fans shall be made with heavy woven asbestos cloth at both the inlet and discharge. The connections shall be at least 6" long and securely fastened to prevent any air leakage.

(d) Access Doors:

1. Furnish and install access doors in ductwork for access to dampers and controls. Access doors shall be of the pan type of not less than 20 gage sheet metal.

2. This Contractor shall furnish to the General Contractor all access doors required for installation in hung ceilings, walls, partitions, furring or whatever else required. Access doors shall be of type and construction approved by the Architect.

39. REGISTERS, GRILLES AND DIFFUSERS

(a) Furnish and install all diffusers, registers and grilles where indicated on the drawings and of sizes and capacities noted. All diffusers, registers and grilles shall have factory prime coat and sponge rubber gaskets.

(b) Return and exhaust registers shall be Tuttle & Bailey type T-78, or as approved, with fixed horizontal streamline bars and key operated volume louvers. Furnish and install frames for registers mounted in hung ceilings.

(c) All registers shall be securely fastened to the construction and sheet metal duct with screws, in an approved manner, and shall make an airtight fit with adjacent surfaces.

(d) Furnish and install rectangular ceiling diffuser of the restricted multi-orifice type as manufactured by Air Devices, or as approved. Diffusers shall distribute the air uniformly throughout the space without drafts. Air motion in the zone of occupancy shall not exceed 50 FPM nor be less than 20 FPM. Diffusers shall be of sizes and capacities noted on the drawings with all necessary blanking for proper air delivery. Diffusers shall be furnished with Flexitrols. Each diffuser shall be provided with a removable core and shall cause no air noise. The Flexitrols shall have individually adjustable blades to regulate velocity and direction of air flow, and control volume at each diffuser. Diffusers shall be type RC.

40. FINNED PIPE RADIATION

(a) Furnish and install finned pipe radiation where shown on the drawings and of capacities noted. Capacities are based on 190°F average water temperature.

(b) Finned Radiation shall be Architectural Sill-line manufactured by Nesbitt, model A-11.

(c) Elements shall be 1" copper tube with aluminum fins, 63 fins per foot. Provide off-set adapters for each element.

(d) Enclosures shall run wall-to-wall or column-to-column with valve compartments on both ends. Enclosure edges shall form a neat butt joint without the use of butt straps or other concealing devices. No unfinished metal edges shall be visible.

(e) Furnish and install all other accessories and items for a complete and proper installation. Accessories shall have no exposed metal edges.

(f) Colors shall be as selected by the Architect.

(g) Each enclosure shall be provided with a screw-operated blade damper.

41. PUMPS

(a) Furnish and install pumps for the heating coil water systems where shown on the drawings and of sizes and capacities noted. Pumps shall be close coupled, centrifugal type, suitable for temperatures of water for which they are used. Pumps shall have cast iron casings, stuffing boxes bronze impellers, and shall be non-overloading at all points of operation. Sleeves shall have a hardness of 500 Brinell or greater.

(b) All pumps shall be mounted on 6" concrete bases. The bases shall be furnished by others but this Contractor shall furnish the anchor bolts and templates required.

(c) Pumps shall be manufactured by the Federal Pump Co., or as approved.

(d) Heating coil water pumps shall be 2" CK, 115 GPM, 48 feet head, 1750 RPM, 3 HP, 2" discharge, 3" suction.

42. WATER HEATING SPECIALITIES

(a) Furnish and install in each new convector and finned-pipe radiator a balancing fitting and manual air vent. Fitting and vent shall be Sarco, or as approved.

(b) Furnish and install float type air vents at the high points of all water piping systems. Vents shall be Hoffman No. 78, or as approved.

(c) Furnish and install for each new convector and finned-pipe radiator (at the return side after the balancing fitting) one modulating water valve, Sarco-Marsh, or as approved.

(d) Furnish and install in the supply at each new convector and finned-pipe radiator one quick opening valve for shut-off purposes. Valve shall be Sarco-Marsh, or as approved.

(e) Radiator valves shall be without vent.

43. FANS

(a) Furnish and install all fans as hereinafter described, where shown on the drawings and of sizes and capacities noted.

(b) Fans shall be American Blower Sirocco Utility Sets, or as approved, with motor, drive, drive guard, weather cover, backdraft shutters, space for mounting a disconnect switch, and vibration isolators.

(c) Coordinate fan base requirements with the General Contractor.

44. INSULATION

(a) Furnish and install non-conducting covering as specified herein. The installation shall be in strict accordance with the best practice of the trade and the intent of this Specification.

(b) -All flow and return heating piping shall be covered with 3/4" of Fiberglass insulation suitable for the temperatures involved. Insulation shall be heavy density sectional pipe insulation as manufactured by Owens-Corning Fiberglas Corp. and shall be furnished with standard canvas jacket pasted and banded. Valves and fittings shall be insulated with 3/4" of fabricated pipe insulation as for the piping, neatly fitted and pointed up with finishing cement. 6 Ounce canvas shall be applied over valves and fittings for a neat, uniform appearance. Canvas at joints shall be pasted for neat, continuous, uniform appearance. Insulate all existing heating piping in Cellar and First Floor.

(c) All fresh air and return ducts in the Equipment Room shall be insulated with 1" Fiberglas Rigid Vapor Seal Duct Insulation, type FF, foil faced, manufactured by Owens-Corning, or as approved. Impale the insulation over suitable approved mechanical fasteners, such as adhered clips, on 12 inch centers. A minimum of two rows of fasteners per side, top and bottom shall be used. Secure insulation with suitable approved washers or clips, removing all points and sharp edges so as to present a smooth surface. All joint, punctures, tears and breaks shall be sealed with 4" wide strips of glass fabric imbedded between two coats of vapor barrier mastic: Benjamin Foster fire resistive aluminum pigmented vapor barrier mastic, or as approved. Plenums, sofed-off portions of louvers, collar connections to diffusers, and any and every part of the fresh air and supply duct systems shall be insulated as herein specified.

(d) Refrigerant liquid piping shall be covered with heavy density sectional low temperature pipe insulation, 1" thick, as manufactured by Owens-Corning, or as approved, with vapor barrier flame retardant jacket - adjoining sections shall be butted firmly together and the longitudinal seam of the vapor barrier jacket shall be sealed with Fiberglas Lap Cement or other suitable vapor seal adhesive. End joints shall be sealed with 4" factory furnished vapor barrier strips applied with Lap Cement. Ends of pipe insulation shall be sealed off with vapor barrier strips applied with Lap Cement. All valves and fittings shall be insulated with molded insulation of a thickness equal to that of the insulation on the adjoining pipe, securely fastened in place. Piping shall be finished with factory-furnished bands. One band shall be applied over each edge of the joint sealing strip and an additional band at midsection of insulation. Insulation on valves and fittings shall be vapor sealed with 0.002" aluminum foil wrapped. Foil shall be finished with an 1/8" layer of a vapor seal adhesive trowelled neatly over the fitting with the jacket on the adjacent pipe insulation lapped at least 2" over the mastic. Piping located outdoors shall be weatherproofed with 35 pound roofing felt wired on and sealed with two coats of asphaltum. Support piping outside of insulation and protect insulation with galvanized iron saddles, not less than 12" long, at each support or hanger.

(e) All supply and return air ductwork shall be lined with rigid coated ductliner as manufactured by Owens-Corning, or as approved. Lining shall be 1" thick and of not less than 3 pound density of a type approved by the NBFU. Dimensions of ducts as shown on the drawings include allowance for insulation to be installed. Duct liner shall be adhered to each side with minimum 50% coverage of an approved fire retardant adhesive. Use mechanical fasteners, Stick-Klip or as approved, on 12" centers on each side with not less than 2 rows of fasteners per side where such side has a dimension of 12" or larger. Side shall include top and bottom. All abutting edges of acoustic linings shall be caulked, and all exposed edges of acoustic linings shall be installed with sheet metal nosings."

(f) —Remove all existing pipe insulation and re-cover all existing piping as specified herein.

45. CONTROLS

(a) Furnish and install all electric controls as specified herein and in other paragraphs of this section of the specifications.

(b) All zone thermostats shall have built-in thermometers. Thermostats shall be gradual acting.

(c) Furnish and install motorized dampers in the inlets of the general exhaust fans, and motorized dampers in the fresh air ducts for the air conditioning units and equipment room fresh air inlet. Dampers shall open when their respective fan starts and shall close when their respective fan shuts down. See elsewhere in these specifications for fan interlocks.

(d) Furnish and install modulating motors to operate the zone dampers of the multi-zone unit. Motors shall be controlled by room thermostats in each of the zones. Thermostats shall be located where shown on the drawings or where otherwise directed by the Architect. Install a switch at the cold deck damper of each zone so that the compressor shall start when any zone calls for cooling and the compressor shall stop only when all cold deck dampers are closed. Furnish and install all relays required. Thermostats shall be gradual acting.

(e) Connect air cooled condensers to load side of their respective compressor so that condenser will start when the compressor starts and will stop when their respective compressor stops.

(f) Furnish and install a modulating 3-way valve at each heating coil. Valves shall be controlled by a ductstat at the hot deck to maintain leaving air off the heating coils of 82°F for the Second Floor unit and 85°F for the First Floor unit. Valve PD=5 psi. Ductstats shall be adjustable.

(g) Furnish and install a freeze protection thermostat in the discharge of the heating coil to stop the fan if the temperature falls below 42°F.

(h) All controls, specified herein or elsewhere in this section of the specifications shall be Barber-Colman, or as approved.

(i) Air conditioning units and heating coil pumps shall be manually started. All other motors are started automatically.

(j) All control wiring shall be by this contractor under supervision of the control manufacturer. All control wiring shall be run concealed.

46. EXISTING EQUIPMENT

(a) It is the intent of the design to re-use the existing boiler, fuel oil tank, hot water heating pump, cooling tower pump, and piping.

(b) It is the intent of the design that the existing hot water heating system remain in use to serve the second floor and such new radiation installed on the first floor.

(c) A new oil burner shall be installed in the existing boiler. It shall be the responsibility of this Contractor to file with the Department of Air Pollution and obtain their approval for the oil burner replacement.

(d) This contractor shall clean, repair and put into first class working order the existing combustion chamber, boiler, boiler insulation, breeching insulation, existing pumps, controls and all other devices and equipment remaining in use.

(e) Boiler tubes shall be thoroughly cleaned and boiler water side shall be drained, flushed and cleaned.

(f) Furnish and install plug valves in the discharge of each existing pump.

(g) Furnish and install new pressure gages in the suction and discharge of each existing pump.

(h) Furnish all labor and materials necessary to flush and clean the existing piping systems.

(j) This Contractor shall visit the site, examine the plans and specifications for all trades and thoroughly familiarize himself with all items and full extent of the work. He shall remove or relocate all existing equipment, piping or ductwork as required to accommodate the work of this alteration at no extra cost to the Owner.

47. OIL BURNER

(a) The existing oil burner and fuel oil pump shall be removed by this Contractor. Extend the existing 1½" fuel oil supply and return piping from point of entry into the boiler room to the new oil burner. The existing fuel oil tank, fuel oil gauge and all existing controls, including the Heat Timer Control System, shall be used. It shall be the responsibility of this Contractor to reconnect the existing controls and devices to the new oil burner installation in a proper manner to provide a proper, safe and complete installation conforming to all rules and regulations of all authorities having jurisdiction.

(b) Furnish and install on the boiler one oil burner where shown on the plans. Each burner shall be of the direct drive horizontal rotary atomizing cup type with built-in primary fuel pump and variable volume, positive displacement type, meterin' pump for precision metering of oil to the burner atomizer. The burner shall be complete with low fire start and high-low fire, automatic combustion safety controls, primary and secondary strainers, valves, and magnetic starter with overload heaters. The burners shall be listed by Underwriters Laboratories to burn No. 4 CSG fuel oil.

(c) Burner motor shall be 3/4 H.P., 208 volts, 3 phase, 60 cycles. Each burner shall have a capacity of 23 GPH.

(d) Burners shall be provided with ignition gas valve, ignition transformer, interconnecting cables and gas electric ignition plug. Burners shall be mounted so that it can be swung out of firing position without disturbing or disconnecting the high tension ignition cables. Burners shall be provided with latch for locking in firing position, with built-in switch wired into the burner control circuit in such a manner that the burner will not operate unless locked firmly in firing position.

(e) Run a gas line to burner, from existing connection with suitable drip connections.

(f) Re - use existing oil burner and boiler controls in proper condition. Replace all broken controls with new ones.

(g) Furnish and install for oil burner a pre-wired protected control cabinet assembly as made by the manufacturer of the oil burner provided. The cabinets shall be so arranged for wall mounting and shall contain the necessary circuit protection, motor starters, signal lights and programming and flame failure safeguard controls. Components required for burner, but not limited to, are as follows:

1 control cabinet with key lock and handle.
1 Fireye FP-2 electronic flame safeguard system.
1 magnetic starter with thermal overloads for burner motor.
1 circuit breaker for burner motor (flush mounted).
1 circuit breaker for control circuit (flush mounted).
1 two pole, single throw control circuit toggle switch.
1 red alarm signal light (flame failure).
1 green signal light (ignition).
1 amber signal light (oil valve).

(h) All electric wiring for the oil burner installation shall be by this Contractor. Wiring shall run in galvanized rigid conduit and shall conform to the National Electric Code, the electrical division of the specifications and local governmental electric requirements.

(i) Oil burners shall be 75A53 manufactured by S.T. Johnson Co., or as approved.

(j) All valves, accessories, controls, etc., required by all authorities having juristiction shall be installed as a part of this section of the specifications. Voltage for controls shall be 120 volts.

(k) This Contractor shall, at no additional cost to the Owner, file with all authorities having jurisdiction, providing, obtaining and paying for all plans, necessary permits and inspections required by local ordinances and authorities to install and place the oil burning system in operation.

(l) This Contractor shall furnish and install all other items as may be required for a complete and proper operating installation including new steel front plate, refractories, wiring and controls.

(m) Furnish and install a new barometric damper in the existing breeching.

48. STEAM ROOM BOILER & PIPING

(a) Furnish and install an electric steam generating unit for the Steam Room. Unit shall be Thermasol model PPH0 special, 3 phase, 208 volts, 110 amps. Unit shall be factory wired, assembled and tested ready for installation. Equipment shall have ¼" thick all - aluminum inner tank with stainless steel immersion heaters, built-in automatic water feeder, low-water cutoff, fully insulated in 1" thick insulation, built-in relay, pilot light, water sight glass gauge, pressure control, relief valve, drain valve, flush out valve, fuse protected control circuit and switch, all assembled in a heavy gauge bonderized steel cabinet with a baked-on enamel finish.

(b) Thermostat to control the steam room's temperature to be Thermasol's TL-3 remote bulb type with a 60° - 250° range. All equipment to be installed according to Thermal's installation instruction and plans. Unit shall have 2" steam outlet.

(c) Furnish and install red brass piping from the unit into the Steam Room and under the benches. Run piping approximately six inches above the floor. Fittings shall be 125 pound brass screwed fittings.

49. DEMOLITION, REMOVALS AND RELOCATIONS

(a) This Contractor shall perform all necessary demolition, removals and relocations for preparation of the existing building to receive the new work and for the proper installation of the new work.

(b) Any demolition shown on the drawings shall be considered only as a guide and are not intended to show every single item of work required. Actual field conditions will determine the precise work to be done. Should any question arise as to whether or not any duct, piping, radiator, equipment, or other item should be removed, relocated or remain as presently installed, this contractor shall request, in writing, clarification from the Architect. Because the architectural and mechanical drawings indicate the intent of the scope of work no extra charges will be allowed for any removals or relocations necessary for the installation of the work under this section of the Specifications.

(c) Remove all existing ductwork, fans, baseboard radiation, air conditioning units, air handling units, unit heaters and thermostat from the Cellar and First Floor plus all other items not indicated to remain or is otherwise required for operation of the completed work of this alteration.

(d) Should there be any question whether or not an item shall remain or be removed, this Contractor shall fully acquaint himself with the location, use and function of the item, transmit this information to the Architect in writing, and request clarification.

(e) Removal shall include taking from the premises and disposal of removed items. However, prior to removal from the premises, this contractor shall contact the Owner or their appointed representative, and determine what items they wish to retain in their possession. Those items shall be taken by this contractor to the location designated by the Owners for acceptance by them. Those items turned over to the Owners shall be cleaned and placed in good repair.

(f) No ductwork, register, grille, piping, valve or fitting removed from its present location shall be re-used except where specifically noted otherwise.

(g) This Contractor will be responsible for the failure of any existing system, piping or equipment to function properly upon completion of his work upon said system or equipment or upon any part of same.

(h) Attention is called to the fact that the work is to be performed in an existing building. Before proceeding with any work in occupied or used areas, this Contractor shall apply to the Architect for permission to enter such areas. The Contractor is obliged to perform his work only at the time or times designated by the Architect. There will be no additional compensation for work performed after hours or on off days.

(i) Where radiators, piping, ductwork, etc., are removed, piping and ductwork shall be removed to a point which will be concealed behind finished walls, floors or ceilings and shall be properly capped or plugged, except where such piping or ductwork is indicated to be removed in its entirety in which case such piping or ductwork shall be completely removed throughout its run.

(j) Where connection is made to existing systems, this Contractor shall obtain prior approval from the Architect before making such connection and, particularly if interruption of operation of the system is required for making connection, only at the times and for the duration permitted by the building authorities and the Architect.

50. VIBRATION ISOLATION

(a) All equipment furnished under this section of the specification shall be furnished with vibration isolation.

(b) Unless specified otherwise all motor driven apparatus shall be mounted on rubber-in-shear vibration isolators.

51. MOTORS, STARTERS AND INTERLOCKS

(a) This Contractor shall furnish all electric motors and starters for the work under this Contract.

(b) Electric service available is 208/120 volt, 3-phase, 60 cycles, 4 wire, alternating current.

(c) Unless otherwise noted, motors ½ HP and larger shall be 208 volt, 3 phase, 60 cycle, squirrel cage. Motors smaller than ½ HP shall be 120 volt, 1 phase, 60 cycle, capacitor type. Unless otherwise noted, motors shall be open, general purpose enclosure, 40°C. Motors for belt drive shall be furnished with slide rails.

(d) Starters for motors smaller than ½ HP and not automatically controlled shall be Allen Bradley Bulletin 600, Form 52P, or as approved. Starters for motors smaller than ½ HP and automatically controlled shall have magnetic starters with 120 volt coils, thermal overload protection and pilot lights. Starters for motors ½ HP and larger shall be magnetic, general purpose type, with overload and low voltage protection and equipped with all auxiliary contractors required by controls. Starters for equipment automatically controlled

shall have hand-off-automatic switch in cover. Starters for equipment not automatically controlled shall have start-stop pushbuttons in cover. These starters shall be Allen Bradley Bulletin 709 or as approved. All starters shall be furnished with pilot lights.

(e) It is the intent of this Specification that all control wiring, interlock wiring, and in general, all wiring for work done under this section of the Specifications, except power wiring, shall be provided under this section of the Specifications by this Contractor. This Contractor shall furnish all starters, switches, relays, contractors and all other auxiliaries and accessories required for a complete and proper operating system. Disconnect switches, except where otherwise called for in this Specification, shall be furnished by others. See Electrical drawings for locations of starters.

(f) Interlock the Second Floor General Exhaust Fan and Toilet Exhaust Fan to the Second Floor Multi-Zone Unit to start when the unit fan start and stop when the unit fan stops.

(g) Interlock the First Floor General Exhaust Fan and Toilet Exhaust Fan to the First Floor Multi-Zone Unit to start when the unit fan starts and stop when the unit fan stops.

(h) Connect air cooled condensers to load side of their respective compressor so that condenser will start when the compressor starts and will stop when their respective compressor stops.

(i) Locate all starters for the interlocked equipment in the Air Conditioning Equipment Rooms.

(j) Starters for Multi-Zone Units shall be part winding.

52. CONCRETE BASES

Concrete bases shall be by others. This Contractor shall furnish all anchor bolts, and templates or drawings showing location of anchor bolts and dimensions of bases for pumps, or any equipment included in this Contract requiring bases. Except where otherwise required, bases shall be 6" high.

53. NAMEPLATES AND TAGS

(a) Furnish and install for each starter, switch, fan, pump, chiller, etc., an aluminum nameplate identifying the item; the nameplate shall be of .020" gage, 2½" x 3/4", with black enamel background and natural aluminum letters and borders.

(b) Furnish and install on the handwheel of each valve a brass valve tag with filled in black numbers. Three copies of a valve chart identifying each valve shall be given to the Architects. Valve tags shall be 1½" in diameter with brass hooks for attachment.

(c) Nameplates and valve tags shall be as manufactured by the Seton Nameplate Company, or as approved.

54. TOOLS

All special tools for proper operation and maintenance of the equipment provided under this Section of the Specifications shall be furnished to the Owner with instructions as to the use and operation of same.

55. TESTING, ADJUSTING AND BALANCING

(a) After the entire installation has been completed, this Contractor shall determine the operation of the completed installation during both the heating and cooling seasons making all required adjustments to diffusers, registers, dampers, fans, pumps, heating equipment, controls, etc., to obtain the performance requirements as noted on the drawings and/or as specified.

(b) The entire air conditioning and ventilation systems shall be carefully tested and adjusted to secure air flow at each diffuser and register of not less than the quantity noted on the drawings, and without objectionable drafts or noise. Test reports showing pertinent operating data, such as CFM at each outlet, fan RPM, motor voltage and current readings after proper balancing, etc., shall be submitted to the Architects. Five copies of such reports are required. Method of balancing and test devices to be used shall be described and such method submitted for approval by the Architect prior to making any required tests and measurements.

(c) During this testing period, make all necessary adjustments of the automatic temperature control system.

(d) All piping shall be subjected to a hydrostatic test of 100 lbs. per square inch for a period of 8 hours.

(e) The Architect shall be notified sufficiently in advance of all tests so that he may be represented at such tests.

(f) Provide all necessary testing equipment and all necessary temporary piping connections.

(g) Make good all defects found. Leaking joints shall be remade. No calking will be permitted. Tests shall be repeated until all defects are remedied.

(h) Concealed lines shall be tested before they are furred in. This Contractor shall be required to make good damage to the building, or parts of same, resulting from leaks in his lines.

(i) On completion of the work, the systems shall be blown through to clean out core sand and other foreign material.

(j) All work shall be left complete and in first class working order. All motors and other equipment shall be thoroughly cleaned and lubricated.

(k) All refrigerant piping and equipment shall be tested with a halide torch and proven free from leaks.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

MILTON SILVERMAN, :

Petitioner :

vs. :

UNITED STATES OF AMERICA :

- X

AFFIDAVIT

68 Cr 762

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WILLIAM DOHERTY, being duly sworn, deposes and says:

1. Now retired, I was the Dispatcher in charge of operations at the premises 10 East 15th Street, New York City, the building owned by the United Wire, Metal and Machine Welfare Fund and occupied by Local 810 of the International Brotherhood of Teamsters.

2. I had been employed by Local 810 for more than fifteen (15) years. In 1967 and before, staff members and officers of Local 810 were served with Grand Jury subpoenas in connection with an investigation of Union activities. More than twenty (20) officers and staff members were subpoenaed to appear before the Grand Jury at one time. I worked closely with the attorneys, and the required appearances were staggered. Arrangements were made for various persons to appear on various days and other persons were notified to appear on subsequent days. When I received names of the parties whose appearance was required, I would post notices or communicate with such people so that the Union affairs would continue to operate in an orderly fashion with adequate personnel.

3. When the many subpoenas were served on various members, staff, personnel and officers, I was besieged with inquiries and questions as each subpoena was served. I communicated with the attorneys for the Union and they suggested that I advise any Union member served to obtain legal counsel, and if they desired, the Union counsel would be available for consultation and legal guidance. A number of the subpoenas were issued in c/o Local 810 and our Union attorney asked that he be notified of the name of any Union member served with a subpoena in connection with this investigation, so that he might adequately be prepared for proper advice and guidance to the Union. He suggested that any Union staff member or officer served communicate with him before answering any questions or giving any information.

4. Accordingly, I prepared a notice, directed to all delegates and organizers, advising them not to give out any information and to report to our attorney any subpoenas served or inquiries made of them by the Federal authorities, and any inquiries or conversations about that. The notice, dated August 23, 1967, read as follows:

> "To all delegates and organizers:
> If you are approached by any Federal investigators, do not give them any information. Refer them to our attorney, MR. SHIVITZ.
> Anyone disregarding these orders will be summarily terminated.
> MILTON SILVERMAN"

HOWARD BOLDT of the Union office typed the notice for me, adding the last sentence and typing the name "MILTON SILVERMAN". On the reverse side of the notice I put in the following statement: "These employees have read the order on the reverse side", and listed all of the delegates

and organizers. I placed my initials on the document and the listing of the Union employees is also in my handwriting.

5. MILTON SILVERMAN had no part in the decision to prepare or post this notice and in no way participated in the wording of this notice. I did it at the suggestion of MR. SHIVITZ who asked to be advised as to any activity by the Government in or about the Union headquarters referring to our organizers, delegates or employees. At the time of this incident and all other related matters dealing with this notice, I did not consult with MILTON SILVERMAN, had no conversations with MR. SHIVITZ or his representatives in the presence of MR. SILVERMAN in reference to this matter, and to my knowledge MR. SILVERMAN knew nothing about this notice, although it bore his typewritten name appended to the notice. I did not ask MILTON SILVERMAN for permission to use his name as I had used it in the past on many notices dealing with Union matters.

6. I never knew that this notice had been introduced into evidence, nor that MILTON SILVERMAN was questioned about his knowledge of the notice or his authorization to have it posted in the Union headquarters. When this fact was recently brought to my attention, I advised MR. SILVERMAN that it was MR. SHIVITZ who had directed that the notice be posted, and that I was the author of the notice, and that the portion of the notice referring to termination of employment unless the directive was followed, was my idea in order to secure cooperation of the Union employees involved. I am ready, willing and agreeable to testify to these facts, as I believe that the inferences drawn that

MILTON SILVERMAN participated in the authorship or the direction that this notice be posted, should be corrected so as to set forth the true facts involved in this matter.

William Doherty
WILLIAM DOHERTY

Sworn to before me this
29th day of April 1975.

ARTHUR POWELL
Notary Public, State of New York
No. 31-[illegible]
Qualified in [illegible] County
Commission Expires March 30, 1976

-4-

August 23, 1967.

TO ALL DELEGATES AND ORGANIZERS:

If you are approached by any Federal Investigators, do not give them any information. Refer them to our attorney Mr. Shivitz.

Anyone disregarding these orders will be summarily terminated.

Milton Silverman

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MILTON SILVERMAN,		
vs.	Petitioner	AFFIDAVIT
UNITED STATES OF AMERICA		68 Cr 762

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

HOWARD BOLDT, being duly sworn, deposes and says:

1. I am the editor for Local 810, International Brotherhood of Teamsters, and for the United Wire, Metal and Machine Health and Welfare Fund and have been so employed for the past twelve years.

2. Part of my duties consists of writing the local union's newspaper, writing informational material directed to the Union members and correspondence between the Local Union and the International Union and directives to the Staff, Organizers and Delegates of the Union.

3. On August 23, 1967, Mr. William Doherty asked me to type a message which he said had been requested by the Union's attorney with the instructions to relay it to the Organizers and Delegates.

4. I have since refreshed my memory about the contents of this message (now known as Government Exhibit #47: United States vs Milton Silverman 68 cr. 672) by examining a photostat copy of it and I can definitely say that this is the notice I typed at Mr. Doherty's request.

Howard Boldt
HOWARD BOLDT

Sworn to before me this
6 day of Aug. 1975.
Leon Pastor

LEON PASTOR
Notary Public, State of New York
No. 24-4622240
Qualified in Kings County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

MILTON SILVERMAN, :

Petitioner :

vs. :

UNITED STATES OF AMERICA :

- X

AFFIDAVIT

68 Cr 762

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DAVID I. SHIVITZ, being duly sworn, deposes and says that:

1. Deponent is an attorney admitted to practice in all the Courts of the State of New York and the United States Supreme Court, and has been a practicing attorney for over forty years.

2. In 1967 deponent represented Local 810 of the United Brotherhood of Teamsters and Local 1614 International Brotherhood of Electrical Workers. At that time the United States Government had under study various books and records of the aforementioned Locals. This had been a recurring process over the years. In the course of these investigations your deponent and Mr. Silverman, on behalf of the Locals, always cooperated fully with the authorities.

3. In the course of the investigation subpoenas were issued to officers and employees of both Locals and to the Trustees of the Welfare and Pension Funds. Many of the subpoenas were issued en masse, returnable all at the same time and date.

4. In order to maintain a semblance of control

over deponent's representation of his client, deponent issued instructions that all of the personnel communicate with deponent before responding to inquiries or attending sessions of the Grand Jury in the course of the investigation.

5. Deponent is advised that pursuant to such instructions a notice was posted on the bulletin board over Mr. Silverman's typewritten name.

6. Deponent has learned that an employee or officer at the Unions, other than Mr. Silverman, was responsible for the posting of that notice based on an erroneous interpretation of deponent's instructions. This was without the knowledge of your deponent or Mr. Silverman.

7. I have read the affidavit of William Doherty which covers much of the matter referred to herein and while deponent's recollection is not as precise as Mr. Doherty's, his recollection coincides with your deponent with respect to Mr. Silverman's involvement with the notice.

David I. Shivitz

Sworn to before me this
18 day of August 1975.

SEAN MANISCALCO
Notary Public, State of New York
No. 41-7696250
Qualified in Queens County
Commission Expires March 30, 1976

AL:cf

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MILTON SILVERMAN,	:	
Petitioner	:	AFFIDAVIT IN OPPOSITION TO MOTION
-v-	:	
UNITED STATES OF AMERICA	:	75 Civ. 4989
Defendant.	:	

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

ANDREW MALONEY, being duly sworn, deposes and says:

1. I am an attorney admitted to practice in the bar of this Court and am a partner in the law firm of Maloney, Viviani and Higgins, 1290 Avenue of the Americas, New York, New York.

2. I was an Assistant United States Attorney in the Southern District of New York from January, 1962 through March, 1972 and was Regional Director of the Department of Justice, ODALE from March, 1972 through September, 1974.

3. While an Assistant United States Attorney I was in charge of the prosecution of United States of America v. Milton Silverman, 68 Cr. 762 and am fully familiar with the matters herein.

4. As Your Honor might recall from the atmosphere of the trial, most of the witnesses called by the government were under the domination and control of the defendant

Milton Silverman.

5. This was evidenced by the fact that all Teamster employees of Local 810 had to first be given immunity before testifying in the grand jury or at trial.

6. Indeed, it was the government's strategy in this case to subpoena a number of the aforesaid employees for each day of trial without the customary and normal pre-trial interview and order of witnesses in order to protect the integrity of the fact finding process and to avoid undue coercion on the union's part of any of these persons.

7. Thus, all of the union's employees subpoenaed for trial were uniquely available to the defendant Milton Silverman and under his domination and control.

8. With respect to Jacob Friedland, Your Honor will recall, he was also uniquely available to the defendant Milton Silverman having been retained by the union during the course of the grand jury investigation. Furthermore, the government had to request the Court to grant immunity to Mr. Friedland in order to secure any testimony concerning the alteration of union records. Once that immunity was granted, the government did not know what in fact his testimony would be.

9. It is clear from the proceedings in this case that at some time after service of the grand jury subpoena for Local 810 records, but prior to the production pursuant to that subpoena, Mr. Friedland was retained by the union to examine said subpoenaed records. Similarly, it is clear that during said time a portion of those

records were altered. The specific change in those records i.e., the authorization of $2,000 loan, benefited no one but the defendant Milton Silverman.

10. It was the government's position at the trial and is the government's position at this time that to the extent Mr. Friedland's testimony on this issue was less than candid, if at all, it benefited only the defendant Milton Silverman.

WHEREFORE, for all of the foregoing reasons and those set forth in the accompanying Memorandum of Law, the motion should be denied.

ANDREW MALONEY

Sworn to before me this

day of January, 1976

AL:cf

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MILTON SILVERMAN,	:	
Petitioner	:	
-v-	:	75 Civ. 4939 (63 Cr. 762)
UNITED STATES OF AMERICA,	:	
Respondent.	:	

GOVERNMENT'S MEMORANDUM OF LAW
IN OPPOSITION TO MOTION TO VACATE
SENTENCE PURSUANT TO 28 U.S.C. §2255

Preliminary Statement

On September 18, 1968, an indictment was filed charging the defendant Milton Silverman in eighteen counts, with embezzling funds of two unions which he headed and causing false entries to be made in their cash books, minute books and general ledgers as well as making false statements in reports filed with the Secretary of Labor. On March 14, 1969 the defendant Silverman was convicted by a jury before the Honorable Edmund L. Palmieri, United States

District Judge on all counts except those pertaining to false reports (counts 16 and 17). The defendant was sentenced to four months on each count, the sentence on counts one through fifteen to be served concurrently but consecutively with the sentence imposed on count eighteen. In addition, the defendant was fined $1,000 on each count.

On an appeal consolidated with a motion for a new trial the Court of Appeals affirmed the conviction of counts nine through fifteen and count eighteen, but reversed on counts one through eight. United States v. Silverman, 430 F.2d 106 (2d Cir. 1970). As a result the total fines imposed were reduced from $16,000 to $8,000, but the eight months' prison sentence was unimpaired.

Certiorari was denied by the Supreme Court on May 3, 1971. Silverman v. United States, 402 U.S. 953 (1971). A rehearing of that denial was also denied. 403 U.S. 925 (1971). Silverman was released from the Federal Correctional Institution at Danbury, Connecticut, on December 21, 1971.

On November 15, 1971 the defendant

Silverman commenced his second collateral attack on the conviction by filing a motion, pursuant to Title 28, United States Code, Section 2255. This motion sought to vacate the judgment of conviction on the ground that the proof at trial constituted an impermissible amendment of Count 18 in violation of the defendant's Fifth Amendment right. This motion was denied by the Honorable Edmund L. Palmieri, United States District Judge, in an opinion dated March 21, 1972. (71 Civ. 4997.) The denial of this motion was affirmed by the Court of Appeals in open court following oral argument. United States v. Silverman, 469 F.2d 1404 (2d Cir. 1972). Certiorari was denied on this motion as well. Silverman v. United States, 93 S.Ct. 2271 (1973).

STATEMENT OF FACTS

The defendant now moves for the third time to collaterally attack his judgment of conviction. This application, pursuant to Section 2255, Title 28, United States Code, seeks to vacate the sentence imposed by Hon. Edmund Palmieri and set the conviction aside on the grounds that the prosecution knowingly utilized perjured testimony and failed to produce certain exculpatory material to the defendant.

Specifically, defendant asserts three claims of error: (1) That the testimony of one Jacob Friedland was perjurious and that the Government solicited that testimony; (2) that the testimony of Paul Chlystun was perjurious and that the Government would have known had the investigation not avoided certain lines of inquiry; and (3) that the testimony of defendant's domination and control of Local 810 as evidenced by Government's Exhibit 47* was false. In addition, defendant claims that

*Government's Exhibit 47 reads as follows:
"If you are approached by any Federal investigators do not give them any information. Refer them to our attorney, Mr. Shivitz. Anyone disregarding these orders will be summarily terminated."
(Emphasis in original.)

Count 14* cannot stand on the basis of interpretation of certain contract provisions relating to the Welfare Fund building.

With respect to the testimony of Jacob Friedland, the defendant puts forward the sworn affidavits of one Sophie Oschak, one Max Sanchez and one Herman Brickman. In essence, the affidavits state that the witness, Jacob Friedland, instructed Sophie Oschak to alter the minutes of Local 810's Executive Board meeting on December 3, 1965. Thus, the defendant claims that the government presented perjured testimony in that the witness, Jacob Friedland, testified that he had no recollection of the original board minutes.

The second claim of error involves Count 14 and the testimony of Paul Chlystun. Here, the

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* Count 14 provided as follow:
On or about the 18th day of July, 1966 in the Southern District of New York, MILTON SILVERMAN, the defendant, unlawfully, wilfully and knowingly, directly and indirectly, did embezzle, steal, abstract and convert, to his own use, and the use of another, monies, funds, securities, property and other assets of a labor organization of which he was an officer and by which he was employed, to wit Local 810, International Brotherhood of Teamsters and Local 1614, International Brotherhood of Electrical Workers in the amount of $1,000.

defendant asserts that had the government interviewed one George Greenberg, a principal of Reader-Green, the general contractor of the Welfare Fund building and examined in more detail certain lease provisions, it would have concluded that Paul Chlystun's testimony with respect to the $1,000 payment to the defendant was perjurious. In connection with this claim the Court is provided with the affidavits of Robert Blakeman, Esq., attorney for Reader-Green Corp., and Lawrence Cohen, former project coordinator for Reader-Green Corp. Further defendant argues that there was a "spill-over" of such tainted evidence from Count 14 to the remaining counts.

Third, defendant offers the Court an affidavit of one William Dougherty which states that Government's Exhibit 47, part of the government's evidence of defendant's domination and control of Local 810, was prepared by him and not the defendant. Thus, the defendant's conviction which is based on that evidence must fall.

Finally, the defendant claims that certain contract provisions for the construction work on the

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Wolfare Fund building make it clear that the air conditioning unit, which was the subject of Count 14, was not the property of the Wolfare Fund and thus, the defendant's conviction could not be based on it.

Once again the defendant seeks to burden both the Court and the government with claims of error from his 1968 trial which are both utterly frivolous and without basis in fact. This represents yet another attempt by the defendant to impeach a 1968 conviction which in a variety of contexts has been reviewed and/or affirmed by United States courts on seven* separate occasions.

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* The seven occasions are: (1) Defendant's motion for a new trial denied by Hon. Edmund L. Palmieri; (2) Defendant's appeal from conviction consolidated with the denial of the motion for new trial affirmed in part, reversed in part, 430 F.2d 106 (2d Cir. 1970); (3) Denial of certiorari from the direct appeal, 402 U.S. 953 (1971); (4) Denial of rehearing for certiorari of direct appeal, 403 U.S. 924 (1971); (5) Section 2255 motion number 1 denied by Hon. Edmund L. Palmieri dated March 21, 1972; (6) Affirmance of denial of section 2255 motion by Court of Appeals, 469 F.2d 1404 (2d Cir. 1972); (7) Denial of certiorari of section 2255 motion, 93 S. Ct. 2271 (1973).

ARGUMENT

The standard of review for a motion pursuant to Title 28, United States Code, Section 2255 based upon previously undiscovered evidence is that the evidence must have been discovered after trial, must be material to the factual issues at the trial and not merely cumulative or impeaching, and of such a character that it would probably produce a different verdict in the event of retrial. United States v. Kahn, 472 F.2d 272, 287 (2d Cir. 1973); United States v. De Sapio, 456 F.2d 644, 647 (2d Cir. 1972); United States v. Polisi, 416 F.2d 573 556-77, (2d Cir. 1969). However, in one limited category of cases, evidence of governmental misconduct, the courts have permitted a less exacting standard of review, namely, the materiality of the newly discovered evidence to the defendant's conviction.

It is certainly not unpredictable that defendant Silverman tries to squeeze his claims of error within this one category. However, try as the defendant Silverman does to couch his petition within the guise of prosecutorial misconduct, the claims clearly do not fall within this limited area, and, therefore, must perforce meet the more exacting standard of review.

With respect to Count 14 (defendant's second and fourth claims of error), the defendant moves to vacate the conviction arguing that had the Government probed deeper into the legal ramifications of the contract provisions for the Welfare Building it would have concluded (1) that it should have asked additional questions of one witness, Mr. Cohen, and should have interviewed another witness, George Greenberg; and (2) that the conviction could not stand as a matter of contract law. Using the above two arguments, defendant Silverman claims ergo witness Chlystun committed perjury. In reviewing motions for a new trial, courts "do not employ the omniscience of a Monday morning quarterback as the standard for determining what investigationsshould have been made by the Government." United States v. Stofsky, et al., Dkt. Nos. 74-1860, 74-1869, 75-1247, 75-1253 Slip Op. Nos. 4,5,6,7 at 525 (2d Cir. November 7, 1975). What defendant claims the Government failed to do falls far short of even a negligent failure to investigate. See United States v. Keough, 391 F.2d 138 (2d Cir. 1968); United States v. Stofsky, supra. Thus, applying the more exacting standard

of review to the defendant Silverman's averments on Count 14, it is clear beyond cavil that essentially what has been put before the Court as misconduct on the part of the Government is an argument which the defendant himself should have made to the jury at trial. A motion, pursuant to Section 2255, may not be used to litigate defendant Silverman's analysis of the Welfare Building's contract provisions; that issue should have been presented at trial or on direct appeal. Castellana v. United States, supra. Moreover, defendant Silverman must satisfy the court that the facts asserted in the affidavits of Lawrence Cohen and Robert Blakeman are, in fact, newly discovered and could not with due diligence have been discovered before or, at the latest, at trial. United States v. Costello, 255 F.2d 866, 879 (2d Cir.), cert. denied, 357 U.S. 937 (1958). This defendant Silverman has also failed to do. Both the actual contracts and leases, and the individual employees of the contractor and subcontractor were clearly available to the defendant prior to trial, and no claim has been made or could be made to the contrary.

Defendant Silverman's claim with respect to Government's Exhibit 47 and the affidavit of William Dougherty similarly falls short of the mark. The affidavit of William Dougherty fails to satisfy defendant Silverman's burden of demonstrating how with due diligence what is presented here was not available to him prior to trial inasmuch as Mr. Dougherty was employed by the union. United States v. Costello, supra. Moreover, the affiant states in his affidavit that he was instructed by union counsel, Mr. Shivitz, to prepare the memorandum. Mr. Shivitz was not only available to the defendant Silverman prior to trial, but was actually present in the courtroom during the trial.

Finally, defendant Silverman seeks to vacate his sentence and set aside his conviction on the ground that the witness, Jacob Friedland, an attorney, committed perjury during the trial when he denied involvement in the alteration of the minutes for the December, 1965 Board meeting. As stated recently by the Second Circuit in United States v. Stofsky, supra, at 530, to vacate sentence and grant a new trial on the grounds of perjury by a Government witness, the defendant must still show a "probability" that the new evidence will produce a

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different result.

At the threshold, however, is the claim that the witness perjured himself. This is not one of those rare breed of cases where the witness' testimony was so bizarre as to raise an inference that he was an inveterate perjurer. See Mesarch v. United States, 352 U.S.1(1956); United States v. Zane, 507 F.2d 346, 348 (2d Cir. 1974), cert. denied, 421 U.S. 910 (1975); nor is it a case where the witness has now come forward and recanted the previously sworn testimony. See, e.g., United States v. Johnson, 487 F.2d 1278, 1279 (4th Cir. 1973); nor even is it a case where other sworn testimony has indicated that the testimony at the trial in issue may have been perjurious. See United States v. DeSapio, 456 F.2d 644, 648-49 (2d Cir. 1972). What is presented here are the sworn affidavits of two employees of the union in the employ of the defendant Silverman at the time of the trial, and an affidavit of an unrelated attorney. All state that it was the witness Jacob Friedland who directed the Board minutes altered. At least with respect to Sophie Oschak and Max Sanchez, they

were available to the defendant prior to and during the trial, and, thus, any claim that this is only recently "discovered" is utterly frivolous. See accompanying affidavit of Andrew Maloney, Esq. Moreover, Mr. Friedland testified under a grant of immunity and would not speak to the United States of America prior to trial. (See accompanying affidavit of Andrew Maloney, Esq.) Therefore, to state that the United States Attorney's office was aware of possible perjury is similarly without merit.

Even assuming the truth of the new affidavits, the essence of the new proof is probative only of the witnesses' participation in the alteration of the minutes, and therefore, at best is impeachment material for the defendant Silverman to use with the witness, Jacob Friedland. It is not exculpatory with respect to the defendant Silverman. To conclude that such an admission by Mr. Friedland would "probably" affect the jury's verdict is absurd. See United States v. De Sapio, supra at 648. Moreover, as stated in United States v. Stofsky, under similar circumstances, it is a non sequitur to suggest that even if Mr. Friedland caused

the minutes to be altered, he did not do it at the direction of the defendant Silverman who hired him as counsel on behalf of the union to respond to the Grand Jury subpoena. United States v. Stofsky, supra at 531. It is clear that on the basis of the defendant Silverman's proffer that even if the witness Jacob Friedland did perjurehimself with respect to that issue, the disclosure would "probably" not produce a different result.

CONCLUSION

Motions to vacate sentence should only be granted with great caution. United States v. Costello, supra at 879. This policy is particularly apt in the present motion inasmuch as the defendant Silverman has litigated ad nauseum the facts and circumstances of his 1968 conviction. The Government submits that in the proper exercise of the Court's discretion no hearing is required and the petition should be dismissed.

Respectfully submitted,

THOMAS J. CAHILL
United States Attorney for the
Southern District of New York
Attorney for the United States of America

ALAN LEVINE
Assistant United States Attorney
Of Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

MILTON SILVERMAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent

----------X

REPLY AFFIDAVIT

75 Civ. 4989

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LLOYD A. HALE, being duly sworn, deposes and says:

1. I am the attorney for the petitioner herein and make this affidavit in reply to the affidavit and memorandum in opposition submitted by the attorney for respondent.

2. The only "factual" material offered in opposition to the petition consists of a two and one-half page affidavit of Andrew Maloney, Esq., who was the prosecutor at petitioner's trial on indictment 68 Cr. 762. Mr. Maloney states that he is "fully familiar with the matters herein." That is the only statement in that remarkable affidavit worthy of acceptance.

3. What is most remarkable about Mr. Maloney's affidavit is what it does not say. In this case that silence not only speaks louder than words it shouts admission of the facts stated in the petition and cries out that the judgment of conviction should be set aside.

4. Mr. Maloney, "fully familiar" with the facts of the case, his role in it, the investigation and grand jury proceedings before it, and the role of his associates and the government agents (admittedly Mr. Maloney was "in charge of the prosecution") does not challenge the essential allegations of the petition.

KNOWING USE OF PERJURED TESTIMONY
(I - JACOB FRIEDLAND)

5. As to the knowing use of the perjured testimony of Jacob Friedland (see petition, pp. 3-11), the affidavit in opposition admits, sub silentio the following showing in the petition:

A. The devastating rebuttal testimony of Jacob Friedland was perjurious (the memorandum in opposition, p. 14, also accepts the showing of Friedland's perjury but astonishingly suggests the Court disregard it.);

B. Jacob Friedland, as attested by Sophie Oschak, Max Sanchez, and Herman Brickman, alone instigated the change of the Local 810 executive board minutes, which renders petitioner's conviction under count 18 for the alleged falsification of these minutes erroneous;

C. The perjurious Friedland testimony and the nature of the allegations and proof under count 18 infected the other counts on which conviction was had;

D. Miss Oschak and Mr. Sanchez were so intimidated by the prosecution's imputation of wrongdoing to them, the forcing of their repeated grand jury appearances,

prosecutorial statements to them that immunity would be sought for them which was not done, and their virtual sequestration during the trial, that they were afraid and unable to communicate with petitioner or his attorneys about matters which might touch upon the case;

E. Mr. Maloney had told Jacob Friedland that he was a target of the investigation (T. 633);

F. Mr.Maloney had evidence linking Jacob Friedland to the charged fabrication of the executive board minutes (T.646-7) - indeed, he must have, otherwise how could he have sought immunity? (the infirmity in the immunity proceedings is the subject of a separate submission);

G. Mr. Maloney had an affirmative duty under Brady v. Maryland, 373 U.S. 83 (1962) to disclose the aforesaid exculpatory material to the defense as well as not to offer perjurious testimony and to repudiate it once it is offered.

6. The statement in paragraph 8 of the affidavit in opposition that "the government did not know what in fact" Friedland's testimony would be is certainly inaccurate and at the best disingenuous. Mr. Maloney stated to this very Court that he had evidence linking Friedland to the change of the executive board minutes (T. 646-7). Mr. Maloney stated at the trial that he had applied for and been granted authorization to

seek immunity for Friedland in order to secure his testimony (T. 971). It passes belief that the tenor of Friedland's expected testimony was not passed on by the prosecutor to his superiors in the Attorney General's office in support of his application. Friedland was represented at the trial by his own counsel, Robert Scher. It is a well known procedure for counsel for a witness, threatened as a target, to indicate to the prosecutor what the witness's testimony will be in exchange for which immunity is sought. Since Scher played an active role at the trial and before on behalf of his client, Friedland, there is no reason to doubt that at least that happened here.

7. Petitioner made application under the Freedom of Information Act, after that procedure became available to him, for, inter alia, records and documents relating to the alleged grant of immunity to Jacob Friedland. In the several confusing responses to petitioner's application, it was revealed that Mr. Maloney had submitted a memorandum, dated March 11, 1969, to the Department of Justice, which listed "certain background information regarding the request for authorization to immunize Jacob Friedland, Esq." However, the Department of Justice refused to turn over that memorandum (as well as other documents relating to that alleged immunity), claiming that it was exempt as an intra-agency memorandum and as an "unwarranted invasion of personal privacy." An appeal was taken from that determination but petitioner has been informed that the Department of Justice will not rule upon that appeal for several months. A subpoena

has been served upon the United States Attorney's office for the Southern District of New York for Mr. Maloney's memorandum and other material relating to the Friedland immunity. It is respectfully suggested that the Court order production of this essential material, since it would seem obviously to bear upon (1) the prosecution's knowledge of an offense Jacob Friedland had committed with respect to the alteration of the Executive Board minutes but not disclosed to the defense and (2) the prosecution's knowledge that Friedland's testimony that he did not know of any alterations in those minutes was false, prejudicial to petitioner, but allowed to stand uncorrected.

8. It is simply - and demonstrably - not the fact, as paragraphs 7 and 8 of the affidavit in opposition assert, that the Union employees and Jacob Friedland were persons "uniquely available" to petitioner and under his "dominion and control". The prosecution's admitted technique herein of repeated grand jury subpoenas to those employees and the repeated statements and implications that the employees and Jacob Freidland were targets of the investigation and subject to prosecutions for their dealings and association with petitioner rendered them uniquely unavailable to petitioner and his counsel and was tantamount to suppression.

9. Equally as glaring is the failure of the memorandum in opposition to address itself at all to the suppression of the testimony and information which Sanchez, Oschak (and possibly Friedland) could have supplied at the time of trial by repeated threats of prosecution and the use of relentless and repeated

appearances before grand juries, the Department of Labor and the Internal Revenue Service.

10. It becomes evident, then, that the assertion in paragraphs 7 and 8 of the affidavit in opposition that Union employees and Jacob Friedland were "uniquely available" to petitioner and under his "dominion and control" is the exact opposite of the fact. The reasons why this is so as to the employees have already been set forth herein, in the petition and in the affidavits annexed thereto. Certainly once Jacob Friedland, during the investigation of the case, had been warned by the prosecution that he was a target concerning the alteration of the records, had retained his own independent counsel, had been advised by counsel to invoke his privilege against self-incrimination and had refused to testify without full and formal statutory immunity, he was uniquely unavailable to petitioner and petitioner's counsel.

OTHER ISSUES

11. The affidavit in opposition also does not counter and admits, sub silentio, the following essential allegations of the petition:

A. Mr. Maloney, as the prosecutor herein, had a duty to make reasonable inquiry as to the facts, to refrain from blinding himself as to the facts and from concealing or disregarding the truth;

B. The testimony of Paul Chlystun was false and the prosecution was in a position to know that falsity (count 14);

C. The air-conditioners which were the subject of count 14 were the property of the general and/or subcontractors and not of the Welfare Fund or Local 810;

D. The prosecution assiduously failed to inquire into the true ownership of the air-conditioners although the F.B.I. interviewed those who knew (George Greenberg, Lawrence Cohen);

E. The prosecution interviewed Marcus, a principal of the sub-contractor responsible for - and thus owning - the air-conditioners, possibly a key witness to the count 14 transaction who was not available to the defense and the prosecution did not and has not revealed the contents of the statement taken from Marcus;

F. The perjurious Chlystun testimony of the alleged $1,000 payment to petitioner contributed to the guilty verdict on the other counts as well as on count 14;

G. The conviction on count 14 must be set aside and the count dismissed since the crime alleged could not have been committed, inasmuch as the property petitioner allegedly converted was not the property of the Welfare Fund but of the general and/or sub-contractor;

H. The imputation of "dominion and control" over the

unions and the funds to petitioner through the so-called "gag order" notice (Ex. 47) was wrong and prejudicial, rendering the prosecutor's inflammatory summation (comparing petitioner to Adolph Hitler on the basis of Ex. 47) grounded thereon egregious error;

I. The false evidence of "dominion and control" was common to all counts and vitiates all convictions.

12. The affidavit in opposition also ignores the fact that several persons whose testimony was and is essential to the case and to this petition were, in fact, not employees of the Union and were not in any way under petitioner's alleged domination. Herman Brickman was an independent arbitrator not an employee. Similarly, George Greenberg, Lawrence Cohen, (Messers Greenberg and Cohen were not even in this area at the time of the trial), Marcus and Robert Blakeman were not employees. Paul Chlystun was not only not an employee, he was actively hostile to petitioner. (On information and belief, there are statements of Chlystun in the government's files, not disclosed to the defense at trial, which show in great detail Chlystun's eagerness to see petitioner convicted and Chlystun's attempts to link the alleged $1,000 payment of count 14 first to one item, then to another).

13. The memorandum in opposition was prepared by Assistant United States Attorney Alan Levine, who was not a participant in the investigation trial or appeal of this case. (Mr. Levine was not an Assistant at the time.) Therefore, Mr. Levine has no

knowledge of the crucial facts. To the extent that the memorandum in opposition relies upon Mr. Maloney's affidavit it is inaccurate and insufficient for the reasons above stated. Otherwise the memorandum in opposition merely attempts to substitute argument for a factual showing.

14. On information and belief, the production of the additional prosectuion files, long sought by your deponent and moved for as an adjunct to the original petition will reveal information demonstrating further that this petition is not based upon mere hindsight but upon the actual manipulation of facts and witnesses by the prosecution.

15. Since the affidavit and memorandum in opposition are insufficient as a matter of fact and law to traverse the petition it is respectfully submitted that the petition should be granted. Argument hereon and a hearing is also still respectfully sought.

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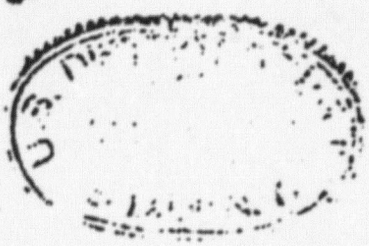
Sworn to before me this
9th day of March, 1976.

Notary Public

LEAH CASPE
Notary Public, State of New York
No. 41-[illegible]
Qualified in Queens County
Cert. filed in [illegible] County
Commission Expires March 30, 1977

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CR 181 OPIN 565



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MILTON SILVERMAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

75 Civ. 4989
(68 Cr. 762)
E.L.P.

----------x

A P P E A R A N C E S

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PALMIERI, J.

This is a motion pursuant to 28 U.S.C. § 2255 to vacate a judgment of conviction. The petitioner, Milton Silverman, was convicted after a nine day jury trial of sixteen counts of an 18-count indictment charging him with embezzlement of union funds and falsification of union books and records. 18 U.S.C. § 664; Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 431(c), 436, 439(b)(c) and 501(c). That conviction was affirmed with respect to eight counts (namely, counts 9 through 15 and count 18) and reversed with respect to the first eight counts. United States v. Silverman, 430 F.2d 106 (2d Cir. 1970). The result of this disposition was to reduce the total fines from $16,000 to $8,000, but to leave the eight month prison sentence unimpaired. The basis for the partial reversal was the view of a majority of the court that their construction of 29 U.S.C. § 501(c) required a reversal of counts 1 through 8 because of insufficient evidence that the payment of certain printing bills for a New York mayoralty campaign constituted a larceny of union funds. Certiorari was denied by the Supreme Court on May 3, 1971, Silverman v. United States, 402 U.S. 953 (1971); rehearing denied, 403 U.S. 924 (1971). The petitioner served his sentence and was released from the Federal Correctional

Institution at Danbury, Connecticut, on December 21, 1971.

The petitioner's first attack upon his conviction was by way of a motion for a new trial, which was consolidated with his appeal. Thereafter, he moved pursuant to Title 28, U.S.C. § 2255, in 1971, to vacate the judgment on the ground that the proof at trial had the effect of amending one count of the indictment (count 18) in contravention of his Fifth Amendment rights. This motion was denied, with an opinion of this Court dated March 21, 1972, and was affirmed by the Court of Appeals in open court following oral argument. United States v. Silverman, 469 F.2d 1404 (2d Cir. 1972), cert. denied, Silverman v. United States, 93 S.Ct. 2271 (1973).

This most recent motion to vacate his judgment of conviction is couched in terms of prosecutorial misconduct -- that the prosecution knowingly used perjured testimony and that it failed to produce material exculpatory of the petitioner. This is not the first time Silverman has attacked the prosecutor. He mounted an unsuccessful attack of the same nature when he appealed from his conviction. See United States v. Silverman, 430 F.2d 106, 124-125 (2d Cir. 1970), cert. denied, 402 U.S. 953 (1971). As in the past, the petitioner is taking another hindsight view of his tactical decisions at the trial and of the evidence presented against him

and is seeking to draw impermissible inferences from them in order to demonstrate that the prosecutor should be faulted.

Specifically, Silverman relies on three alleged claims of error: (1) that the testimony of one Jacob Freidland, an attorney, who testified that he was counsel to Silverman as well as to Silverman's union, was perjurious and that the Government solicited that testimony knowing it was perjurious; (2) that the testimony of one Paul Chlystun was perjurious and that the Government could have ascertained this had its investigation been pursued according to certain lines of inquiry; and (3) that the Government's allegation that petitioner dominated and controlled Local 810, as evidenced by Government's Exhibit 47, was false. As he did at the trial and upon his appeal from his conviction, petitioner seeks to raise issues with respect to the ownership of a certain air-conditioning unit involved with count 14.

The Claim as to the Testimony of Jacob Friedland

Silverman claims that the prosecutor knowingly used false testimony at his trial, and suppressed evidence helpful to his defense. The testimony referred to is that of Jacob Friedland, an attorney retained to examine certain books and records because of a federal grand jury subpoena in February 1967. Friedland testified that, in a

report to Local 810 on March 3, 1967, he had stated that authorizations for certain expenditures did not appear in the minute books. He further testified that he did not recall what the condition of the Executive Board minutes was at the time he originally looked at them prior to making his report. However, he said that by looking at his report, which pointed out that there had been no approval for a loan and a $2,000 payment to Silverman, he concluded that the minutes as presented to the grand jury must have been altered, because when handed over to the grand jury they reflected authorizations for the loan and the $2,000 payment. He also testified that a copy of the report was sent to Silverman.

The essence of Friedland's testimony is contained in the following passage concerning the pages of the minute books the Government contends were fabricated:

> Q You didn't find these two pages in the minute books in this condition they're in today, is that your testimony?
>
> A I have no recollection of the condition of the minute books or how they were written. I do know that making reference to my report I found an inconsistent situation which made me believe that there was a change in the minutes.

To demonstrate that this testimony was false, the petitioner now presents the sworn affidavits of one Sophie Oschak, one Max Sanchez, and one Herman Brickman. Both Oschak and Sanchez were former Local 810 employees.

Brickman was general counsel for the union and testified at the trial.

The affidavits of Oschak and Sanchez assert that Friedland was told by them that the board had approved the loan and the payment to Silverman. They state that the minutes had thereafter been retyped at Friedland's direction to reflect this approval. Brickman, in his affidavit, states that he was present when Friedland was informed by Oschak and Sanchez that the board had authorized the loan and the payment to Silverman. The petition then asserts "reference to the trial record in light of these recent revelations gives rise to the unmistakeable inference that the prosecution had reason to know of the false nature of Friedland's testimony in time to alert the defense. . . ."

More specifically, the petitioner refers to two circumstances: one is the fact that the Government granted immunity to Friedland in order to obtain his testimony; the second is the following colloquy that took place during the trial between the Court and the prosecutor:

> THE COURT: Do you know of any evidence, Mr. Maloney which would possibly link Mr. Friedland with the alleged fabrications of the portions of these minutes, Exhibits 3 and 5?
>
> MR. MALONEY: Yes, your Honor, I am afraid I do but it is not before your Honor or before this Court.

From this the petitioner reasons: "As the prosecutor knew of evidence indicating Jacob Friedland's involvement, it had to be evidence indicating he had a role in the change of the minutes." Silverman has attempted to position his claim within the realm of intentional governmental misconduct because a less exacting standard of review is applied to such conduct in considering the propriety of post-trial collateral relief. See United States v. Kahn, 472 F.2d 271, 287 (2d Cir. 1973), and cases cited there.

However, it is quite clear that the Government neither knowingly used perjured testimony nor suppressed evidence helpful to the defense, knowingly or otherwise. First, the Government certainly did not know what Friedland would testify to before he took the stand. Friedland was closely involved with Silverman and his union activities, was a hostile witness who declined to confer with the Government, and gave the Government no advance knowledge of what he would say if he could be made to testify. He was extremely reluctant to testify and did his best to avoid giving any testimony. He successfully quashed a grand jury subpoena. When first called to testify at trial, he asserted an attorney-client relationship both with respect to Silverman and Local 810 as a basis for declining to answer. When this claim of privilege was rejected, he

claimed protection under the Fifth Amendment and again declined to testify. These tactics completely prevented the Government from using his testimony in its direct case. Finally, Friedland was called in rebuttal at the end of the case and given immunity from prosecution under 18 U.S.C. §§ 2514 and 2516(1)(b). It was only then that he testified.

This was the first time the Government became aware of his testimony and there is therefore no factual basis for Silverman's contention that the Government offered his testimony with knowledge that it was false. Indeed, the prosecutor had no advance knowledge of it whatever.

Second, it is not at all clear that Friedland perjured himself. Silverman implies that Friedland testified that he did not know who altered the books. But the transcript shows that he was quite careful not to go beyond saying that he had no independent present recollection of the state of the books when he first viewed them. The Government had made it clear beforehand that all it would ask Friedland was if he had made a report, if the report was based on the minute books, if the report said that there was no approval in the books for a payment and a $2,000 loan to Silverman, and whether or not that conflicted with the state of the minute books as presented

at trial. The Government did not go beyond this in questioning Friedland and neither did the cross-examination. Friedland never stated that he did not know who had altered the books. His claim of a lack of present recollection has some plausibility since several years had passed between his inspection of the books and his testimony. The possibility of perjury in Friedland's testimony is not strong enough to impose a duty on the prosecutor to assume the existence of perjury and to formally notify the defense of his assumption.

This is particularly true on the facts of this case which make it far more probable that Silverman would have known if Friedland had perjured himself than that the Government would have known. Silverman was the dominant and controlling figure in Local 810. As the prosecutor notes in his affidavit, and as was evident to the Court during the trial, most of the witnesses called by the Government, including Friedland, were under the domination and control of Silverman. The same was true of union employees whom the Government sought to question but who did not testify at trial, such as the two former union employees who have submitted affidavits in support of Silverman's petition. Silverman had hired Friedland to inspect the books and Friedland sent a copy of his report of that inspection to Silverman.

In the same vein, the Government cannot be said to have suppressed evidence of Friedland's role, if any, in the alteration of the books. Counsel for the union and for Silverman as well as Friedland's own counsel sought to avoid Friedland's testimony. After assertions of attorney-client privilege both with respect to Silverman and Local 810 were rejected, Friedland claimed protection under the Fifth Amendment. There was a lengthy colloquy on this claim, participated in by all three counsel mentioned, which included the prosecutor's statement of the possibility of a link between Friedland and the alteration of the books. The claim of privilege was sustained on the basis of this statement.[1] Thus the existence of such

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[1] THE COURT: I prefer to be on safe ground. What concerns me is the doctrine of the link in the chain of evidence. This link in and of itself is not incriminating. Nobody could possibly persuade me that it is incriminating, and I am sure that Mr. Friedland's testimony would not in itself be incriminating. And because it would not incriminate and because it would not incriminate anybody but the defendant or persons in league with him on this charge of fabrication, I have declined to sustain this claim of privilege under the Fifth Amendment on the ground that it does not protect him from incriminating third parties. But what makes me hesitate was your answer to my question as to whether he was a target on the basis of other evidence, and when you answer that question in the affirmative, you placed me in a position where I am afraid I have to sustain his claim of privilege, because I can't tell what a future investigator, another United States Attorney might possibly do in linking this separate and independently unincriminating evidence with other and possibly incriminating evidence in a chain of events that might constitute a possible case against Mr. Friedland, and I certainly don't want to be a party to any procedure which would deprive him of his rights under the circumstances.

evidence was well known to Silverman. He, nevertheless, did not request its disclosure or in any way seek to use it at trial. His present volte-face is nothing more than an attempted reversal of a tactical decision made at trial.

Absent governmental misconduct, the standard of review that Silverman must meet in order to obtain relief is that the evidence which he alleges was previously undiscovered must have been discovered after trial, must be material to the factual issues at the trial and not merely impeaching or cumulative, and it must be of such a character that it would probably produce a different verdict in the event of a retrial. United States v. Kahn, 472 F.2d 272, 287 (2d Cir. 1973); United States v. De Sapio, 456 F.2d 644, 647 (2d Cir. 1972); United States v. Polisi, 416 F.2d 573, 576-77 (2d Cir. 1969). Assuming that Friedland did perjure himself, the standard of review that a challenge based on perjured testimony must meet was recently stated in United States v. Stofsky, 527 F.2d 237, 246 (2d Cir. 1975):

> Upon discovery of previous trial perjury by a government witness, the court should decide whether the jury probably would have altered its verdict if it had had the opportunity to appraise the impact of the newly-discovered evidence not only upon the factual elements of the government's case but also upon the credibility of the government's witness.

The affidavits that contain the allegedly newly-discovered evidence and seek to establish perjury on the

part of Friedland come from two employees of the union with which the petitioner Silverman was intimately connected at the time of the trial, and from his union's attorney, Brickman. The two employees of the union, as well as Brickman, who actually testified at the trial, were clearly available to the petitioner before and during the trial and no claim can validly be made that their testimony is recently discovered. Additionally, even if it be assumed that their testimony was recently discovered, its sole effect would be to impeach Friedland, a witness with close ties to Silverman and clearly hostile to the Government. Counsel for Silverman never attacked the veracity of Friedland and on summation suggested to the jury that he was mistaken. There is neither solidity or persuasiveness in any of the affidavits submitted by Silverman to support the charge that Friedland perjured himself.

The testimony contained in these affidavits is not necessarily exculpatory with respect to Silverman and it would be utterly inconceivable to conclude that even if Friedland were shown to have directed the alteration of the books that that would have had the probable effect of changing the jury's verdict or that it would have the probable effect of a different verdict on retrial. Even if Friedland caused the minutes to be altered, it cannot

be assumed that he did not do it at the direction, explicit or implicit, of the defendant Silverman who had hired him as counsel on behalf of the union to respond to the grand jury subpoena. See United States v. Stofsky, supra, 527 F.2d at 247. The alteration of the books was of central importance to Silverman. Friedland's reason to alter them, if he did, could only have been to please his employer, Silverman. The jury in this case was charged: "There is no evidence in this case linking any action of the defendant with the alleged fabrication." Yet there was circumstantial evidence from which the jury concluded that Silverman was responsible for that fabrication. It is highly improbable that further evidence as to the individuals who actually supervised and performed the fabrication would lead to a different conclusion.

The Testimony of Paul Chlystun

The essence of Silverman's claim of error is that had the Government probed more deeply into the facts concerning the disposition of an air-conditioner, it could have determined that Chlystun lied and that the air-conditioner was the property of the contractor. Chlystun's testimony was that Silverman instructed him to sell the air-conditioner and that the cash proceeds from the sale were delivered to Silverman. Everything the Government is charged with failing to do could conveniently have

been done by Silverman. At the trial the credibility of Chlystun was sharply attacked and Silverman called a number of witnesses with respect to the alleged true value and ownership of the air-conditioner. A petition under 28 U.S.C. § 2255 may not be employed to relitigate issues already adjudicated on trial or appeal. United States v. Thompson, 261 F.2d 809 (2d Cir. 1958); Meyers v. United States, 446 F.2d 37 (2d Cir. 1971). All Silverman is saying is that he is now prepared to litigate the air-conditioner issue using different tactics. The Government cannot be faulted under such circumstances. The suggestion is utterly without validity.

The Authorship of Exhibit 47

Relevant to intent and necessary to the Government's case in order to counter the anticipated defense that the expenditures were authorized and for the benefit of the unions, was the evidence of Silverman's domination and control of the unions. To demonstrate this control the prosecution introduced a notice (Government's Exhibit 47) which had been directed to all delegates and organizers, and posted for their attention while the union was under grand jury investigation: It read:

> "If you are approached by any Federal investigators do not give them any information. Refer them to our attorney Mr. Shivitz.
>
> "Anyone disregarding these orders will be summarily terminated."
>
> "Milton Silverman"
>
> (emphasis in original)

The petitioner now asserts that the prosecution ignored one important consideration when it used this piece of evidence at trial, namely that these were not the words of Milton Silverman. In support of this claim petitioner presents the affidavit of an ex-employee of the union who states that he prepared the notice and that he inserted the final sentence of the notice containing the threat of termination. He says it was done without consulting Milton Silverman. Petitioner also submits corroborating affidavits of a union attorney, David I. Shivitz and of another union employee who typed it. Here again the petitioner seeks to relitigate a matter on the basis of facts he obviously knew. This allegedly new evidence was known, assertedly, by two union employees who could have been called, and by Shivitz who attended the trial and who testified as a character witness for Silverman.[2]

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2 Shivitz was indeed an active participant in the trial and gave every indication of a highly partisan interest.

Shivitz engaged the Court in a prolonged and painful attempt to prevent the Court from obtaining or inspecting the Friedland report. Shivitz even went to the extraordinary length of claiming the report was "under seal" and that it should not even be marked for identification. The seal, it developed, was his own. Additionally, there was evidence at the trial that Shivitz and his firm had received substantial legal fees from the unions and from the successful borrowers of the union funds. If Government Exhibit 47 had indeed been prepared and posted without Silverman's knowledge or consent, and Shivitz knew it, it is inconceivable that he would have failed to testify about it. The conclusion is inescapable that whatever he knew about Government Exhibit 47 was not

But the argument falls of its own weight because Silverman himself testified about Exhibit 47 when he was confronted with it on cross-examination and he sought to repudiate the second paragraph as well as his general responsibility for it. His testimony is as follows:

"Q I show you 47 for identification. Have you ever seen a copy of that before?

"A Yes, sir. It was shown to me sometimes. I have seen it before.

MR. ROGGE: May I see what we are talking about?

MR. MALONEY: In a moment, counsel. A few more questions as a foundation.

"Q Did you issue that directive as it indicates?

"A I don't know whether I issued that. It was shown to me.

"Q You approved it?

"A I don't know whether I approved it or not."

* * *

"Q About that time you were familiar with such a document like this existing? Is that correct?

"A Not the document, the thought.

(Footnote 2 continued)

considered to be sufficiently important to be mentioned at trial or that he was fully aware of Silverman's testimony which covered the very point and which is now sought to be raised again at this late date.

"Q The thought?

"A The thought, but I didn't have any knowledge of the last clause. I think someone was overzealous.

"Q Is that the only part you take objection to?

"A I did not construct this nor did I sign this notice and I don't know where this notice was posted or to whom it was given, but this is -- I would say the first paragraph are my sentiments and my suggestions to the employees when thet asked us what if they are interrogated, I told them to see their attorney, Mr. Shivitz."

Having thus placed the issue before the jury by his own testimony, and the testimony having been obviously rejected by the jury, he cannot now burden the Court with it as a basis for this petition. This contention of Silverman's is a gross imposition on the Court.

Motion denied in all respects. It is so ordered.

Edmund L. Palmieri

EDMUND L. PALMIERI
U. S. D. J.

Dated: New York, N. Y.
May 5, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

MILTON SILVERMAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Defendant.

- X

75 Civ. 4989
(68 Cr. 762)
E.L.P.

SIR:

PLEASE TAKE NOTICE that a motion is hereby made on the petition filed herein and the affidavit of counsel annexed with a hearing at such time as may be convenient to the Court and counsel for an order pursuant to Rules 26 and 60 of the Federal Rules of Civil Procedure vacating and setting aside the opinion and order of this Court herein, compelling production of the material specified in the subpoena served on the United States Attorney for the Southern District of New York on or about March 8, 1976, setting a date for the taking of the testimony of Herman Brickmann and referring this matter to another Judge of this Court and for such other and further relief as the Court may deem just and proper.

Dated: New York, N.Y.
June , 1976

YOURS, etc.

LLOYD A. HALE
Attorney for Petitioner
36 West 44th Street
New York, N.Y. 10036
972-0170

TO: ROBERT B. FISKE, JR., Esq.
United States Attorney
for the Southern District of
New York
One St. Andrew's Plaza
New York, N.Y. 10007
Alan Levine, Esq.
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

MILTON SILVERMAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Defendant.

- X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

LLOYD A. HALE, being duly sworn deposes and says:

1. I am the attorney for petitioner Milton Silverman and make this affidavit in support of a motion to vacate the opinion and order of The Honorable Edmund L. Palmieri herein, filed May 7, 1976, to compel the United States Attorney to comply with the subpoena served upon him March 8, 1976 (a copy of which is annexed hereto), to preserve the testimony of Herman Brickman, and to refer this matter to another Judge of this Court.

2. The filing of this Court's opinion took counsel and petitioner by surprise. Petitioner's subpoena of March 8, 1976, served upon attorney for respondent, called for production of documents essential for consideration of the petition and not otherwise available to petitioner. Shortly after service of the subpoena, your deponent received a telephone call from Assistant United States Attorney Alan Levine, who is in charge of this matter for respondent, who stated that he had applied to the chambers of Judge Palmieri for an adjournment of the subpoena and that the application had been granted.

3. The subpoena called, inter alia, for production of a memorandum dated March 11, 1969, of Andrew Maloney, Esq., formerly

the Assistant United States Attorney in charge of the prosecution of petitioner in 68 Cr. 262, which memorandum was sent to the Department of Justice and stated the basis for an application to grant immunity to the witness Jacob Friedland, the knowing use of whose perjured testimony is a basic ground for the petition herein. Petitioner only learned recently of the existence of this memorandum pursuant to an application under the Freedom of Information Act to the Department of Justice for production of material concerning said application for immunity. The Department of Justice, after first stating that there was no record of any such application, eventually acknowledged the existence of the Maloney memorandum but refused to produce it. That decision has been appealed and an expedition of the appeal was requested so that this essential evidence would be before this Court before a ruling was made on the petition. Expedition of the appeal was denied and the appeal is still pending. The existence of the Maloney memorandum, the pending application under the Freedom of Information Act and the subpoena for production of it were brought before this Court in paragraph 7 of the petitioner's reply affidavit filed herein on or about March 9, 1976, and this Court's assistance to compel the production of that memorandum and the other essential evidence demanded in the subpoena was there sought.

4. Not only was production of that evidence not ordered, this Court's opinion, denying the relief requested in the petition, stated "the Government cannot be said to have suppressed evidence of Friedland's role, if any, in the alteration of the books." (opinion, p. 10) It is manifestly unfair to hold that petitioner has failed to show prosecutorial misconduct in the knowing use of perjured testimony while at the same time failing to require respondent to produce the contemporaneous memorandum of the very

prosecutor concerned which would in and of itself demonstrate the tainted knowledge of the prosecutor as to Friedland's responsibility for the fabrication of the minutes and as to the perjurious nature of Friedland's testimony. At petitioner's trial, the prosecutor failed to disclose the existence of his memorandum concerning Friedland's involvement as he was required to do under the standards of 18 U.S.C. §3500 and Brady v. Maryland, 373 U.S. 83 (1962). Petitioner cannot be held to have failed to bring out at the trial that which the prosecutor deliberately withheld from him. To rule against petitioner herein while allowing respondent to continue to suppress evidence on his behalf indicating that the conviction should be set aside is tantamount to denial of due process.

5. Another egregious error in the Court's opinion concerns the rejection of the evidence which petitioner has been able to present to demonstrate the perjured testimony of Jacob Friedland.

6. In dismissing the affidavits of Oshak and Sanchez the opinion of this Court (p.) accepts the position of respondent that as union employees they were under the dominion and control of petitioner and, therefore, presumably available to testify on his behalf at the trial. Unfortunately that holding ignores the fact as stated in the affidavits of those prospective witnesses at the hearing which should be held on this petition that their testimony for, indeed communication with, petitioner at the time of the trial had been effectively suppressed by the prosecutor's repeated compulsion of their presence before grand juries at which times they were accused of implication in the alleged crimes of petitioner and told that their testimony would be compelled under a grant of immunity which was not forthcoming. Although the very

prosecutor involved filed an affidavit in opposition to this petition, he made no attempt to deny that he suppressed the testimony of these witnesses in the manner they have attested.

7. Equally as harmful to petitioner is the assumption made in the opinion herein that the essential witness to Friedland's perjury, Herman Brickmann, was an employee of the union and who actually testified at the trial and was thus available to petitioner at that time. Perhaps the Court was misled by the similarity of his name to that of Henry Brickman, who was counsel to Local 810 and did testify at the trial of petitioner but who did not have knowledge of the facts presented in support of the petition. This confusion cannot however be made petitioner's responsibility. It was stated in the petition (p. 5) that Herman Brickman was not even related to Henry Brickman, had no relationship with either Local. Herman Brickman's independence from either union and petitioner is stated in paragraph 2 of his affidavit annexed to the opinion as are the reasons why his testimony was not available to petitioner at the trial (id. at paragraphs 8, 9).

8. It would be the purpose of the hearing requested herein to clear up any such misunderstandings unknown to petitioner and counsel until the filing of the opinion herein. In any event it is respectfully requested that a date be set for the taking of the testimony of Herman Brickman, since he is now in his eighties and the necessity for his evidence has been made manifest.

9. Your deponent also respectfully suggests that upon vacation of the opinion and order herein, that the petition be assigned to another Judge of this Court. It is unfortunately true that this case has been before Judge Palmieri on several occasions. However it cannot be said that the present petition is "a gross imposition on the Court" (opinion p. 17), when the

essential facts in support thereof were unknown to petitioner through suppression by the prosecutor which continues to this day through failure to produce the Maloney memorandum. Petitioner seeks only a vindication of his innocence through vacation of his conviction which was procured through prosecutorial suppression and knowing use of perjured testimony. It cannot be said that petitioner's evidence "would [not] have the probable effect of a different verdict on retrial" (opinion, p. 12) when he has been denied the opportunity to present that evidence. Although the petition was filed October 8, 1975, the United States Attorney's office received several adjournments of the time to answer, filed an unresponsive answer which effectively admitted the allegation of the petition, and obtained an adjournment of the subpoena for the Maloney memorandum and other essential evidence apparently sine die. Accordingly, it is respectfully requested that the petition be referred to another Judge who could approach it without having been so influenced by prior proceedings.

WHEREFORE, it is requested that the motions in all respects be granted.

Lloyd A. Hale
Attorney for Petitioner
36 W. 44th St.
New York, N.Y. 10036
972-0170

Sworn to before me this
day of June, 1976.

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES ATTORNEY
SOUTHERN DISTRICT
OF NEW YORK

CASE NO. 75 Cr. 4989

JUDGE'S INITIALS EJP

YOU ARE HEREBY COMMANDED to appear in the United States District Court
r the Southern District of New York, at the courthouse, Foley Square in the City of New York, in
id District, on the 9th day of March A.D. 1976 at 4:30 P.M.
lock P M. of said day and bring with you
1. Memorandum of Andrew Maloney, Esq., dated on or about March 11, 1969, re granting of immunity to Jacob Friedland in 68 Cr. 762;
2. All other books, papers, records, documents, memoranda concerning immunity to Jacob Friedland and other witnesses in 68 Cr. 762;
3. Remainder of your files in 68 Cr. 762 concerning exhibits, Sec. 3500 material, Brady material and such other material as the Court may deem just and proper,

en and there to testify on behalf of the Petitioner

a suit pending in said Court wherein Milton S. Isserman is Petitioner is Plaintiff

d the United States of America is Respondent Defendant.

March 8, 1976

Attorney for Petitioner

26 W. 44th St. N.Y.C.

Address 972 0170

RAYMOND F. BURGHARDT, Clerk.

By M. C. Beeran

M. C. BEERAN, Deputy Clerk.

AL:mi

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

MILTON SILVERMAN,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

75 Civ. 4989

- -x

GOVERNMENT'S REPLY MEMORANDUM

This memorandum is respectfully submitted in opposition to petitioner's motion to vacate the opinion and order of this Court filed May 7, 1976.

BEST COPY AVAILABLE

AL:mi

STATEMENT OF FACTS

The original petition submitted herein claimed three bases for collateral review of the defendant Silverman's 1969 conviction for embezzling union funds. Petitioner now moves for reargument of one of those claims, viz. that the testimony of Jacob Friedland was perjurious and that the Government solicited that testimony. To support the application for reargument, petitioner claims the Court erred in failing to consider (1) certain documents subpoenaed by petitioner relating to Jacob Friedland, and (2) the proferred testimony of one Herman Brickman. Finally, petitioner asks the Court to reassign this petition because of the Court's alleged bias.*

On March 7, 1976, the date petitioner filed his reply papers on this petition, petitioner served

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*Petitioner moves for reargument pursuant to Rules 26, 45 and 60 of the Federal Rules of Civil Procedure. Rule 26 prescribes the civil rules with respect to discovery and inspection; Rule 45 provides for civil subpoenas; and Rule 60 provides for relief from civil judgment or order.

AL:ml

the United States Attorney's office with a civil subpoena duces tecum requiring the United States Attorney's Office to produce certain documents on March 9, 1976 at 4:30 P.M. in the United States Courthouse and to "then and there testify on behalf of the Petitioner." That subpoena called for the production of:

1. Memorandum of Andrew Maloney, Esq., dated on or about March 11, 1969, re: granting of immunity to Jacob Friedland in 68 Cr. 762;

2. All other books, papers, records, documents, memoranda concerning immunity to Jacob Friedland and other witnesses in 68 Cr. 762;

3. Remainder of your files in 68 Cr. 762 concerning exhibits, Section 3500 material, Brady material, and such other material as the Court may deem just and proper.

The Government has not formally responded to this subpoena.

Limi

ARGUMENT

Petitioner's application with respect to Jacob Friedland's testimony is more properly understood within the context of the Court's opinion of May 7, 1976. Without burdening the Court with citations from its own opinion, it, nevertheless, is significant to note two salient facts as found by the Court. First, in analyzing Friedland's testimony the Court found that even assuming petitioner's facts with respect to the alteration of the union minutes, Mr. Friedland did not perjure himself at trial. Secondly, the Court found that even considering the modifications of Mr. Friedland's testimony which petitioner alleges, it is merely impeachment material and would not even be exculpatory with respect to Silverman. In conclusion the Court stated that it is "highly improbable" the testimony would lead to a different conclusion. Court's opinion at 13.

Thus, it is inconceivable that any of the documents which petitioner has subpoenaed could have any effect whatsoever on the outcome. The Court's opinion, as quoted, assumes in part the most favorable and possible set of facts in petitioner's behalf and then denies the petition on the ground that even those facts would fail to sustain petitioner's burden of proof. United States v. Kahn, 472 F.2d 272 (2d Cir. 1973).

With respect to the subpoena itself, it is clear that the use of a subpoena duces tecum for discovery in a section 2255 application where a hearing has not been ordered by the Court is totally invalid and without any effect. The subpoena duces tecum served herein is a prime example. It was served after all the papers on the petition were filed and while the petition was sub judice with the Court. No hearing was scheduled for March 9, 1976, the return date of the subpoena, and, indeed, nothing was scheduled for that date in

in this case. In fact, the Government is hard-pressed to find any conceivable basis upon which it could have been enforced at the point in time it was served. Thus, the Government, we think, properly has chosen to simply ignore it.*

Secondly, with respect to paragraphs 1 and 2 of the subpoena, it calls for the production of documents already denied the petitioner by the Department of Justice under the Freedom of Information Act. Moreover, without any authority and obviously so because there is none, petitioner claims a post-trial right to an intra-agency memorandum requesting immunity under the "standards of section 3500 [statements by government witnesses] and Brady." (Paragraph 4). Inasmuch as the Court assumed for purposes of part of this application that Mr. Friedland did prepare the

---

*Petitioner claims that the Assistant United States Attorney Alan Levine represented to petitioner's counsel that he had requested and received an adjournment of the subpoena from the Court. To the best of any recollection, the Government advised the Court's chambers of the subpoena, but did not request an adjournment and only represented those facts to petitioner's counsel.

minutes at issue and, nevertheless, concluded that the petition must fail, the immunity documents sought by petitioner could serve no useful purpose.

With respect to paragraph 3 of the subpoena, the Government made available to petitioner during 1975 the documents requested to wit., exhibits, 3500 material and Brady material, in its possession. What the Government did not and will not permit is petitioner's counsel an opportunity to rummage through those files on his own.

Third, the Government submits that in spite of petitioner's persistence the claim relating to Jacob Friedland and the alteration of the minute book amounts to nothing more than a trial strategy decision which counsel now presses this Court for an opportunity to relitigate. At trial, petitioner's counsel did not ask Friedland on cross-examination that his role was, even after the oft-cited

colloquy between the Court and Mr. Maloney. (Opinion at 6.) Moreover, Mr. Maloney made it clear that he would ask Mr. Friedland (Opinion at 8.). The reason for defendant's failure is clear - - that testimony bears no relationship to the guilt or innocence of defendant Silverman.

Accordingly, having reviewed both the content and purported usefulness of the subpoena duces tecum served after this matter was sub judice, the Government submits there is no legitimate basis to amend or alter the May 7, 1976 opinion.

Next, petitioner moves for reargument on the ground that the Court failed to consider the affidavit of Herman Brickman on the issue of Jacob Friedland's testimony. While the Court may have referred to the wrong Brickman in its May 7 opinion, it did not mistake the substance of the affidavit, to wit., that Brickman observed Friedland ask Sophie Oshak to retype the Board minutes. Once

again, the Court has assumed the basis of that testimony in concluding that such testimony, whether available during trial or not, would not have produced a different result.

Finally, petitioner claims the Court should reassign the petition to another Judge for consideration. While the Government would not dispute the statement in the Court's opinion relied on by petitioner in this application that the present petition is a "gross imposition on the Court," it is clear that a fair reading of that paragraph makes plain that the Court was making specific reference to the petitioner's claim relating to the authorship of Government Exhibit 47. The Government submits that in effect this claim amounts to nothing more than a disappointment with the Court's result. As he has on three other occasions, petitioner's remedy is a review of this Court's decision in the Court of Appeals.

AL:mi

CONCLUSION

The Government respectfully requests that the present motion be denied.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney
Southern District of New York
Attorney for United States
of America.

ALAN LEVINE,
Assistant United States Attorney
Of Counsel.

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

MILTON SILVERMAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

- -X

75 Civ. 4939
(68 Cr. 762)
E.L.P.

REPLY AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LLOYD A. HALE, being duly sworn, deposes and says:

1. I am the attorney for petitioner herein and make this affidavit in reply to respondent's memorandum in opposition to petition pending motion for, inter alia, vacation of this Court's opinion and order of May 7, 1976, herein.

2. Inasmuch as the memorandum in opposition fails to respond at all to several essential points of petitioner's motion - e.g., that the prosecutor at the trial of petitioner in 68 Cr. 762 improperly withheld his memorandum concerning Jacob Friedland's involvement in the alteration and fabrication of the union executive board minutes (¶4), and effectively suppressed the testimony, favorable to petitioner of the witnesses Oschak and Sanchez (¶6) and that the Department of Justice has further suppressed the aforesaid prosecutor's memorandum, after belatedly admitting its existence, even for use on the present petition (¶3), petitioner's motion should be granted on this ground alo

3. What petitioner's counsel has sought for two years is production by the prosecutor of material, solely under his control, in support of the petition (see petition, p. 14, n.7). The astonishing statement is made at page 6 of the memorandum in opposition that petitioner has no right to examine material which should have been produced at the trial of 68 Cr. 762 under 18 U.S.C., Sec. 3500 and Brady. That contention is almost immediately contradicted by the statement on page 7 of the same memorandum that the government did make available to petitioner's counsel in 1975 the trial exhibits and 3500 and Brady material. The latter statement ignores the fact that the United States Attorney's office agreed to make available such material (petition, p. 14, n.7) but did not do so and that petitioner sought the aid of the Court to compel production of such essential matter (petitic ¶29, p. 14). Nor was this material not produced - effectively suppress concerned solely with the issue of the knowing use of Jacob Friedland's perjured testimony as the memorandum in opposition states, it also woul show the failure of the prosecutor to produce the record of his interrogation of one Marcus, germane to the issue raised as to the knowing use of Chlystun's perjured testimony under count 14 of 68 Cr. 762, which infected all counts (petition, ¶29, pp. 13-14).

4. The only issue with which the memorandum comes to grip - albeit superficially and erroneously - is the prosecutor's failure to comply with the subpoena duces tecum, served upon his office, to compel production of evidence essential to a proper determination of the issues raised by the petition. Respondent's failure to comply with the subpoena is admitted cavalierly, even with a touch of self-congratulation: "Thus, the Government, we think, properly has chosen to simply ignore it." (memorandum in opposition, p.6).

5. The subpoena duces tecum, a copy of which is annexed to pending motion now before this Court, was served upon the United States attorney's office March 8, 1976 and the $20.00 witness fee extracted from counsel for petitioner. In ¶2 of the affidavit in support of the motion to set aside and correct this Court's opinion and order of May 7 1976, counsel stated, "Shortly after service of the subpoena, your deponent received a telephone call from Assistant United States Attorne Alan Levine, who is in charge of this matter for respondent, who stated that he had applied to the chambers of Judge Palmieri for an adjournmen of the subpoena and that the application had been granted."

6. In response to that statement under oath, Mr. Levine repl in a footnote on page 6 of his memorandum in opposition, neither sworn to nor affirmed, "Petitioner claims that the Assistant United States Attorney Alan Levine represented to petitioner's counsel that he had requested and received an adjournment of the subpoena from the Court. To the best of any [sic] recollection, the Government advised the Court's chambers of the subpoena but did not request an adjournment and only represented those facts to petitioner's counsel."

7. Not only is Mr. Levine's unsworn statement contrary to th recollection of petitioner's counsel, an examination of counsel's record of telephone calls and conversations reveals that counsel's previous statement quoted in ¶5, supra, is correct. The log of incomin calls to petitioner's counsel reveals that at 1:00 P.M. on March 9, 197 Mr. Levine called and stated that he "is sick - calling judges chambers asking for an adjournment on subpoena." (March 9th was the return date) In subsequest conversations counsel had with Mr. Levine, there was no

question that the statements and representations were made that the adjournment requested had been granted. As counsel for petitioner was concerned that the subpoenaed material be before this Court - particularly the Maloney memorandum of March 11, 1969, in support of the application to grant immunity to Jacob Friedland in 68 Cr. 762 (see item 1 of the subpoena, a copy of which is annexed to the present motion papers) - before decision on the petition several subsequent telephone calls were made by petitioner's counsel to Mr. Levine. A notation of an answering call on March 24, 1976, from Mr. Levine to counsel reveals that he would let us know what action he would take on the subpoena. In that same conversation Mr. Levine said that he first wanted to consult his superiors and others in his office before he responded to the subpoena. In none of the several converations betwee Mr. Levine and petitioner's counsel on this subject was it ever contem plated that there should be a decision on the petition without product of the material subpoenaed or, in the event the government decided to oppose production, without a chance for petitioner's counsel to be hea in support of production in response to a motion to quash.*

8. In fact the attorney for respondent took neither action production or quashal, as is admitted at page 3 of the memorandum in opposition - thus as effectively frustrating the petitioner's attempt to bring before this Court essential evidence in support of the petiti as did the Justice Department in its refusal to produce the Maloney

* The suggestion is now belatedly made that use of a subpoena duces tecum was not available to petitioner. This argument should have been raised on a motion to quash before a decision was reached on the petition not after a decision which was based, at least in part, on petitioners failure to produce the very evidence called for by the subpoen In any event the argument is simply wrong. See Haney v. Woodward & Lathrop, Inc., 330 F.2d 940,942 (4th Cir. 1964); Allen Bradley Co. v. Local Union No.3, Etc., 29 F. Supp. 759,761 (S.D.N.Y. 1939); see also Westinghouse Elec. Corp. v. City of Burlington, 351 F.2d 762,767 (D.C. Cir. 1965) and Nader v. Butz, 60 F.R.D. 381,384-5 (D.D.C. 1973).

memorandum in response to petitioner's application under the Freedom of Information Act and the Department's refusal - with full knowledge of the pending petition before this Court - to expedite petitioner's appeal from that refusal.

9. Under familiar principles, the suppression of the Maloney memorandum and the other material subpoenaed and requested in the petitic by the representatives and agencies of respondent requires that the inference be drawn that the facts which would have been revealed in the material thus suppressed be construed against respondent and in support of the petition. See United States v. Johnson, 288 F. 2d 40,44 (5th Cir. 1961); United States v. Kessler, 364 F. Supp. 66,70-1 (S.D. Ohio 1973). Indeed, under the massive suppression of and refusal to produce essential evidence solely under the control of respondent, the only remedy as to the criminal judgment to which the petition herein is addressed is vacation and dismissal. See United States v. Reynolds, 345 U.S. 1, 12 (1953).

WHEREFORE, it is respectfully prayed that the relief requested in the present motion and in the petition in all respects be granted.

LLOYD A. HALE
Attorney for Petitioner
36 West 44th Street
New York, N.Y. 10036
972-0170

Sworn to before me this
1st day of July, 1976

Notary Public

LEAH CASPE
Notary Public, State of New York
No. 41-
Qualified in Queens County
Cert. filed in County
Commission Expires March 30, 1977

5.00 pd

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

MILTON SILVERMAN,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.

- X

75 Civ. 4989
(68 Cr. 762)
E.L.P.

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
JUL 2 2 22 PM '76

S I R :

PLEASE TAKE NOTICE that petitioner Milton Silverman hereby appeals from the opinion and order of the Court filed herein on or about May 7, 1976, to the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
July 2, 1976

YOURS, etc.

LLOYD A. HALE
Attorney for Petitioner
36 West 44th Street
New York, N.Y. 10036
972-0170

TO: ROBERT B. FISKE, JR., Esq.
United States Attorney
for the Southern District
of New York
One St. Andrew's Plaza
New York, N.Y. 10007
Alan Levine, Esq.
Assistant United States Attorney

Cur'd

CR 181 OPIN 566

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUL 1

MILTON SILVERMAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Defendant.

75 Civ. 4989
(68 Cr. 762)
E.L.P.

44781

APPEARANCES

LLOYD A. HALE, ESQ.
36 West 44th Street
New York, N. Y. 10036

Attorney for Petitioner

ROBERT B. FISKE, JR., ESQ.
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, N. Y. 10007

ALAN LEVINE, ESQ.
Assistant United States Attorney
Of Counsel

PALMIERI, J.

Petitioner moves, inter alia, to vacate the opinion and order of this Court dated May 7, 1976, denying his petition for relief pursuant to 28 U.S.C. § 2255. The discussion which follows assumes a familiarity with that opinion.

The motion to vacate is apparently brought pursuant to Rule 60, Fed. R. Civ. P., on the alleged premises of surprise and mistake of law and fact. As detailed below, there is no merit to the claim of surprise; the claims of mistake of law merely display disagreement with the adverse decision of the Court; and the confusion as to the identity of one affiant has no effect on the conclusions arrived at. Therefore, the motion to vacate the opinion and order must be denied.

In addition to the motion to vacate, petitioner has moved pursuant to Rules 26 and 45, Fed. R. Civ. P., (1) to compel the United States Attorney to comply with a subpoena duces tecum, (2) to preserve the testimony of one Herman Brickman, (3) to refer the matter to another judge, and (4) for a hearing. These matters are discussed seriatim.

This Court declines to enforce the subpoena. The petitioner served the subpoena, of questionable validity, very late in these proceedings and did not press it even

them. In addition, the Court considers the material sought thereby to be irrelevant and immaterial to the matter at hand.

The petition was filed on October 8, 1975. After a number of delays, each consented to by the petitioner, the Government filed its answer to the petition on January 30, 1976. For all ostensible purposes, the submission of papers was complete at that point and the Court so considered it. However, without requesting leave of court, the petitioner apparently decided, and the Government informally agreed,[1] that he would be allowed to file a reply. After several additional extensions of time, petitioner's counsel filed, on March 9, 1976, a reply affidavit in which he mentioned having served a subpoena on the United States Attorney. Other than this, the Court received no formal notice of the status of the subpoena until the filing of this motion one month after the opinion of May 7, 1976 was filed.

The subpoena was served very late in the proceedings when the petition was sub judice. It was made returnable on a date when no activity was scheduled in this matter, nor was a court order sought to authorize the subpoena or to set a date, time or place for the return. It was served on March 8, 1976, and was made returnable the very next day. Petitioner's counsel claims an Assistant United States Attorney told him, shortly after service of

the subpoena, that the Government had obtained an "adjournment" of the subpoena from the Court. The Government denies this. No such request was made to the Court and no "adjournment" was granted. In the following two months, petitioner made no motion to enforce the subpoena nor did the Government move to quash it.

The fact that there was no scheduled court proceeding to which the subpoena could be made returnable leads the Court to question its validity. See Sullivan v. Dickson, 283 F.2d 725 (9th Cir. 1960)(If a hearing were granted, a subpoena duces tecum would issue as a matter of right.); Taylor v. Litton Medical Products, Inc., 19 F.R.Serv.2d 1190 (D. Mass. 1975). The subpoena was served pursuant to Rule 45 which falls within the section of the Federal Rules of Civil Procedure captioned "Trials." Furthermore, the Notes of Advisory Committee on Rules and Historical Notes begin with the following sentence: "This rule applies to subpoenas ad testificandum and duces tecum issued by the district courts for attendance at a hearing or a trial, or to take depositions (emphasis added). 28 U.S.C.A., Fed. R. Civ. P. 45 at 297. The subpoena here clearly was not issued for the taking of a deposition pursuant to Rule 45(d), despite the words on the printed form, and no hearing or trial was scheduled nor were there any other proceedings to which the subpoena could attach.

BEST COPY AVAILABLE

Even if the subpoena were valid and if the Assistant United States Attorney could be faulted for not making a motion to quash, the Court would not enforce the subpoena under the circumstances described. The fact that the subpoena was served so tardily, and was not thereafter pressed, disposes the Court to refuse to enforce it.

Furthermore, the subpoena presently has no further purpose since the Government has substantially if not fully complied with the requests it contains. The petitioner drew the subpoena in the following language:

> "YOU ARE HEREBY COMMANDED to appear . . . and bring with you
> 1. Memorandum of Andrew Maloney, Esq., dated on or about March 11, 1969, re granting of immunity to Jacob Friedland in 68 Cr. 762;
> 2. All other books, papers, records, documents, memoranda concerning immunity to Jacob Friedland and other witnesses in 68 Cr. 762;
> 3. Remainder of your files in 68 Cr. 762 concerning exhibits, Sec. 3500 material, Brady material and such other material as the Court may deem just and proper,
>
> then and there to testify on behalf of the Petitioner ...."

With respect to paragraph 3, the Government claims to have made available all material includable within the request. The request lacks sufficient specificity to gainsay that claim and petitioner has not cured this insufficiency in any of his papers. With respect to paragraph 1, the petitioner seeks to obtain the memorandum of the prosecutor

at the trial of petitioner, former Assistant United States Attorney Andrew Maloney, dated March 11, 1969, and addressed to the Department of Justice, in which he requested a grant of immunity to Jacob Friedland.[2] Without relinquishing any of its claims and in hopes of expediting this matter, the Government has sua sponte submitted to the Court for in camera inspection, with a request for confidentiality, the Maloney memorandum together with a covering memorandum.[3]

Contrary to the assertion of counsel for petitioner that this is "an extraordinary and prejudicial procedure," the Court sees nothing untoward about the submission of these memoranda for in camera inspection. This is substantially the same procedure the Court would have followed at a hearing on a motion to enforce or quash the subpoena: submission to the Court for resolution of the conflicting claims. The Court has not felt constrained to limit its review of these memoranda to the question of discoverability. Rather it has taken the liberty of considering their effect on petitioner's claims. Since the purpose in subpoenaing these memoranda was to have the Court thus consider them, petitioner has attained his goal. The Court prefers, however, to respect the Government's request for confidentiality. This request is based on reasons that are apparent on the face of the memoranda, are well founded, and are unrelated to petitioner's claims. These memoranda were clearly drawn with an understanding that they would remain confidential, and their

disclosure would probably cause the Government some harm.

The Court has reviewed these memoranda and sees no reason to depart from its prior decision. The petitioner seeks to establish that the Government knowingly used perjured testimony by Jacob Friedland. In the previous opinion, this Court made three findings contrary to petitioner's habeas corpus claim for relief based on this charge: (1) that the Government could not have been certain beforehand what Friedland's testimony would be; (2) that the transcript does not show Friedland to have made the statements that petitioner claims were false; and (3) that any role Friedland may have had in altering the union books would not change the verdict because Silverman was convicted not of altering the books himself but of causing them to be altered, and he alone stood to gain by the alteration. Neither the Maloney memorandum nor its covering memorandum casts doubt on any of these findings. The Maloney memorandum indicates that the prosecutor surmised that Friedland's claim of his fifth amendment privilege was based on some involvement in the alteration of the union's books. This would not support a finding that the prosecution knew what that involvement was. More importantly, as found in the prior opinion, petitioner's assertion that Friedland perjured himself is untenable. A careful scrutiny of Friedland's testimony reveals no basis for finding perjury even if

Friedland himself ordered the alteration of the books. This is not changed by the two memoranda.

Petitioner also claims that the Government failed to disclose exculpatory material in violation of its duties under Brady v. Maryland, 373 U.S. 83 (1962). Unlike the petitioner in Brady, the petitioner here apparently made no request for the allegedly suppressed evidence. This is also not a case of petitioner being unable to request the evidence because he did not know of its existence. The record shows that the Government stated in open court that it had some indication of involvement by Friedland in the alteration of the books and that it had communicated with the Department of Justice concerning immunity for Friedland. On this Due Process theory, petitioner is entitled to relief when, "evaluated in the context of the entire record," "the omitted evidence creates a reasonable doubt that did not otherwise exist ...." United States v. Agurs, ___ U.S. ____, ____, 44 U.S.L.W. 5013, 5015 (June 24, 1976). There is evidence in the record that clearly shows that Silverman directed, dominated and controlled the activities of Local 810 and this was abundantly clear before and during trial from the tenor and maneuverings of his defense. He alone had a strong interest in the alteration of the books. He retained Friedland to respond to the grand jury subpoena. In these circumstances, even assuming that the Government failed to disclose some

evidence, whether it be the Maloney memorandum or the information contained in the affidavits of Oschak and Sanchez and Herman Brickman, or both, it cannot be said that this evidence "creates a reasonable doubt that did not otherwise exist ...."

At trial, petitioner sought to prove that the books had not been altered. The prosecutor had said in open court that he had some indication that Friedland was involved in the alteration of the books, and he also had indicated the limited questions he would put to Friedland. The petitioner knew this, yet he stuck to his theory and argued in summation that Friedland was mistaken. Possibly the petitioner thought that if Friedland were shown to have altered the books, the jury would conclude that he had done so at the petitioner's direction. Whatever the reason, the choice was a binding tactical decision and petitioner is not entitled to a separate trial on each theory available to him.

Regarding the affidavit and proffered testimony of Mr. Herman Brickman, apparently there was some confusion as to his identity. It appears that this Brickman is not the same Brickman who testified at trial and the Court mistook one for the other. However, the fact that he did not testify at trial and may not have been available to petitioner at that time does not change the conclusions stated in the opinion

regarding his proffered testimony. As explained there, its sole effect would be to impeach Friedland, a witness with close ties to Silverman and clearly hostile to the Government. The Court can ascribe to it neither solidity nor persuasiveness. Thus it is not necessary to preserve that testimony by way of deposition or hearing.

Silverman has raised again in this motion his contention that affiants Oschak and Sanchez were not under his dominion and control and were not available to testify on his behalf at the trial because the Government effectively suppressed their testimony by the heavy-handed use of subpoenas and threats of prosecution. The Court rejected this contention in its opinion. But, even if this contention and the affidavits of Oschak, Sanchez and Herman Brickman were accepted as true, the effect, as stated in the opinion, would not be such that a jury would likely, much less probably, reach a different verdict.

Petitioner's motion for recusal is a half-hearted attempt that cannot be taken seriously. He made no effort to comply with the applicable statutory procedures. 28 U.S.C. § 144 (affidavit of bias and prejudice by a party; certificate of counsel of record stating that the affidavit is made in good faith). Moreover, his counsel's affidavit blatantly misrepresents that the Court's opinion characterized the petition as a "gross imposition on the Court." This characterization clearly referred only to Silverman's contention

regarding the authorship of Exhibit 47 -- a matter thoroughly reviewed before the jury which rejected Silverman's views of it. Apparently petitioner is attempting, by the use of spurious and questionable allegations, to launch false issues that will distract attention from the insubstantiality of his claims.

The Court finds that petitioner has raised no substantial evidentiary questions and declines to hold a hearing for any of the purposes suggested in the motion. The Court adheres in all respects to the conclusions set forth in its opinion of May 7, 1976.

The motion is denied. It is so ordered.

EDMUND L. PALMIERI
U. S. D. J.

Dated: New York, N. Y.
July 16 1976

MILTON SILVERMAN v. UNITED STATES OF AMERICA, 75 Civ. 4989 (ELP)
(68 Cr. 762) E.L.P.

Motion denied. See copy of opinion dated July 16, 1976, filed herewith.

EDMUND L. PALMIERI
U. S. D. J.

Dated: New York, N. Y.
July 16, 1976

FILED
JUL 16 4 12 PM '76
U.S.D.C. N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - -

MILTON SILVERMAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Defendant.

- - - - - - - - - - - - - - - - - -

75 Civ. 4989 (68 Cr. 762) E.L.P.

NOTICE OF MOTION AND AFFIDAVIT

LLOYD A. HALE
ATTORNEY AT LAW
36 WEST 44TH STREET
NEW YORK, N. Y. 10036
972-0170

FILED
U.S. DISTRICT COURT
JUL 30 9 41 AM '76
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

MILTON SILVERMAN,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.

- - - - - - - - - - - - - - - - - - - X

75 Civ. 4989
(68 Cr. 762)
E.L.P.

S I R :

PLEASE TAKE NOTICE that petitioner Milton Silverman hereby appeals from the opinion and order of the Court filed herein on or about July 16, 1976, to the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
July 23, 1976

YOURS, etc.

LLOYD A. HALE
Attorney for Petitioner
36 West 44th Street
New York, New York 10036
972-0170

TO: ROBERT B. FISKE, JR., ESQ.
United States Attorney
for the Southern District
of New York
One St. Andrew's Plaza
New York, New York 10007
Alan Levine, Esq.
Assistant United States Attorney

ISSUED
CTD-1 DF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

MILTON SILVERMAN,

Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,

Respondent-Appellee.

- -X

75 Civ. 4989
ELP

STIPULATION

IT IS HEREBY STIPULATED by and between counsel for the parties herein that the annexed copies of correspondence among counsel and the Court be and hereby are made a part of the official record in this case to replace the Court's copies which are missing.

Dated: New York, New York
September 16, 1976

ROBERT B. FISKE, JR.
United States Attorney
Southern District of
New York
Counsel for Respondent
by Alan Levine, Esq.

LLOYD A. HALE
Counsel for Petitioner

LLOYD A. HALE
ATTORNEY AT LAW
96 WEST 44TH STREET
NEW YORK, N. Y. 10036
—
AREA CODE 212
TELEPHONE 972-0170

July 15, 1976

Hon. Edmund L. Palmieri
United States District Judge
United States District Court
Southern District of New York
Foley Square, New York 10007

Re: Silverman v. United States
75 Civ. 4989

Dear Judge Palmieri:

This letter is in response to the letter of Assistant United States Attorney Alan Levine to this Court dated July 8, 1976, concerning the above encaptioned action raising for the first time at this late date the baseless claim that the issue as to his noncompliance with the subpoena duces tecum served upon him and other requests, demands, motions and appeals is moot.

What the July 8, 1976 letter of attorney for respondent patently amounts to is an effort to paper over the chasm of his non-compliance with the lawful process of this Court and his refusal to produce essential material solely under the control of respondent which is necessary for a full and fair determination of the issues raised by the petition.

Respondent's attorney's July 8, 1976 letter asserts that "the Government made available to counsel (for petitioner) its exhibits and 3500 material from the trial..."(Significantly, no such assertion is made as to Brady material which was requested and subpoenaed (¶ 3) even though there are indications that such material exists, e.g.: Reply Affidavit, 3/9/76, ¶12, and undisclosed Maloney memorandum of 3/11/69). Petitioner's counsel has constantly complained that although some files were made available in 1975 - a year after request - they did not contain that material (See petition, P. 14, n.7, and reply affidavit to pending motion, ¶3). Indeed, in response to the continuing applications by petitioner's counsel, Mr. Levine, on February 10,

1976, wrote to counsel, indicating that a carbon copy had been sent to this Court, stating: "Fifteen additional file folders containing materials from the case of United States of America v. Silverman, were produced in my office on February 6, 1976. I have reviewed the contents and none of the trial exhibits or 3500 material were contained therein, except Government's Exhibit 47 with which I assume you are familiar. I have directed that further search be conducted." (emphasis added).

Petitioner's counsel replied to that letter on February 19, 1976, carbon copy to the Court, stating: "Eventually during 1975, in at least two installments, several files were produced and examined by me in the United States Attorney's Office. The purpose of the examination was, was stated to be, and is, to ascertain from the exhibits, the 3500 material, the Brady, and other exculpatory material, and the circumstances surrounding the alleged grant of immunity to Jacob Friedland, further support for and/or light on the Sec. 2255 petition, which petition incorporates a motion for this relief. During the examination material which was confidential (difficult to conceive of at this date) or irrelevant was disregarded. After the examination, I pointed out to Mr. Wohl that the files contained few of the trial exhibits, little 3500 or Brady material, and nothing on the alleged grant of immunity to Jacob Friedland, but did contain indicia that other material in at least the first three categories did exist. . . .

"After the above petition was filed and assigned to yourself we had a lengthy conference in which I summarized the foregoing circumstances and requested the remaining material, which request presumably resulted in the production of the fifteen additional files you mention in your letter of Feb. 10.

"Entreaty is hereby made that examination of the newly found batch of files continue in the same manner as before and in sufficient time as to allow the filing of petitioner's reply herein by the adjourned date of March 9, 1976."

Instead of allowing the examination of those files, respondent's counsel replied in a letter of February 26, 1976, carbon copy to the Court, stating that he had examined the "additional files", determined that they were the same files previously inspected, and said there was no reason for further inspection. Although petitioner's counsel requested that he and Mr. Levine (who had not been assigned this case at the earlier inspection) jointly examine the "fifteen additional files"

to avoid any misrepresentation to the Court as to what they contained. This request was ignored. These actions necessitated the serving of the subpoena duces tecum on respondent on March 9,1976, to secure the material specified therein. Admittedly that subpoena was also ignored by respondent (see memorandum in opposition to pending motion, p. 6, and reply affidavit, ¶4).

A further example of the callous disregard of petitioner's procedural and substantive rights is furnished by the United States Attorney's office's refusal to return books, records and papers seized from petitioner at the time of his arrest on or about May 6, 1968. Repeated requests for their return, including one about the time of the filing of the petition herein, have been made. They also have been ignored although the trial was completed over seven years ago and their continued retention by agents of respondent can serve no other function than continued harrassment and handicapping of petitioner.

The contention that the in camera production of the Maloney and other memoranda in any way effectuate petitioner's rights in respect thereto has been dealt with in counsel's letter of July 8, 1976, to this Court.

No report has been received on the "further search" Mr. Levine stated in his letter of February 10, 1976, he had directed.

This Court, it is respectfully submitted, should not allow the attempt in respondent's July 8th letter to create a record contrary to the facts, in the hope that the letter passing silently into the file of this case may be used as a basis to argue a record which does not exist. That attempt should be specifically repudiated and petitioner's pending motion in all respects be granted.

Respectfully yours,

Lloyd A. Hale
Attorney for Petitioner

LAH:lc
cc. Alan Levine, Esq.
Assistant United States
Attorney
One St. Andrew's Plaza
New York, New York 10007

AL:cr

July 8, 1976

Honorable Edmund L. Palmieri
United States District Judge
United States Courthouse
Foley Square
New York, N.Y. 10007

Re: Milton Silverman v. United States
75 Civ. 4989

Dear Judge Palmieri:

The government has been served with petitioner Silverman's reply affidavit to his motion to vacate the Court's opinion and order dated May 7, 1976. With respect to paragraph 7 of petitioner's affidavit, the Government restates what is contained in its memorandum to Court at page 6, to wit that the Government did not request of the Court an adjournment sine die of the subpoena and did not state to counsel that one had been obtained.

Nevertheless, inasmuch as the Government made available to counsel in 1975 its exhibits and 3500 material from the trial in its possession and made available to the Court in camera the Maloney memoranda, counsel's claim with respect to the subpoena is moot and irrelevant.

Very truly yours,

ROBERT B. FISKE, JR.
United States Attorney

By: _____
ALAN LEVINE
Assistant United States Attorney
Tel: (212) 791-1934

cc: Lloyd Hale, Esq.
36 West 44th Street
New York, New York

LLOYD A. HALE
ATTORNEY AT LAW
36 WEST 44TH STREET
NEW YORK, N. Y. 10036
—
AREA CODE 212
TELEPHONE 972-0170

July 8, 1976

Hon. Edmund L. Palmieri
United States District Judge
United States District Court
Southern District of New York
Foley Square, New York 10007

Re: Silverman v. United States
75 Civ. 4989

Dear Judge Palmieri:

This letter is in response to Assistant United States Attorney Alan Levine's letter of July 2, 1976, to counsel for petitioner in the above captioned matter, which indicates a carbon copy was sent to your Honor.

In that letter Mr. Levine states that in response to what he terms "petitioner's motion for reargument" the Government has submitted the Maloney memorandum of March 11, 1969, to the Department of Justice (concerning the application to grant immunity to Jacob Friedland) and an Assistant Attorney General's memorandum in response thereto dated March 12, 1969, "under a bond of confidentiality for the Court's in camera inspection . . . ." (emphasis added). Mr. Levine's letter does not say when his submission to the Court was made.

On behalf of petitioner, counsel respectfully interposes a strenuous objection to this extraordinary and prejudicial procedure.

This is not the first attempt by the United States Attorney's office to secure a decision adverse to petitioner on "evidence" which he has not been permitted to see let alone to explain, contest or rebut. Prior to the trial of 68 Cr. 762, in an attempt to obtain evidence from Jacob Friedland, then Assistant United States Attorney Andrew Maloney sought to submit grand jury minutes to Judge Murphy for his in camera inspection which procedure Judge Murphy refused to countenance. (See

petition, p. 10, n.6). This Court should again reach the same result at least and until a copy of the Maloney and reply memorandum has been submitted to petitioner.

It is also respectfully submitted that merely rejecting the proffer of attorney for respondent is insufficient relief. Petitioner has sought those memoranda through the subpoena of March 8, 1976, served on respondent's attorney (see affidavit in support of pending motion, ¶3; reply affidavit, ¶¶4-8) which was admittedly ignored by him, and through an application under the Freedom of Information Act to the Department of Justice which denied the application and refused to expedite petitioner's appeal, still pending, from that denial with full knowledge of the pendency of the petition. (See affidavit in support of pending motion, ¶3; reply affidavit, ¶8).

What respondent's action in attempting to submit these memoranda solely under its control in camera now after the petition has already been denied is a contempt of this Court, a flaunting of its process and a denial of due process to petitioner. Petitioner has sought those memoranda from the only two sources available - the United States Attorney's office and the Department of Justice - by the only means available to him, by request, demand subpoena, formal application and appeal. It is obvious from the respondent's attorney's present submission that the United States Attorney's office had in its possession the memoranda but ignored the lawful process of this Court for its production - petitioner's subpoena duces tecum - instead waiting until after the denial of the petition and then submitting it in camera. The Department of Justice similarly frustrated petitioner's rights by denying expedition of his appeal from its refusal to produce the memoranda under the Freedom of Information Act.

What these actions mean is that respondent's attorney and the Department of Justice have arrogated to themselves the function of judge and jury on issues of procedure, fact and law.

The petition calls for production of material under Brady v. Maryland, 373 U.S. 83 (1962), which commands production of exculpatory material for timely use by the petitioner not for ex parte in camera submissions after an adverse decision has already been rendered.

The petition filed herein makes grave charges of knowing use of perjured testimony in bringing about petitioner's conviction under 68 Cr. 762. The memoranda now submitted were timely sought by petitioner through all legal means at his disposal. Respondent's agents' and attorneys' refusal to produce that material means that those agents and attorneys have taken the position that they alone have the right to determine what, if any, evidence should be submitted in a proceeding to determine the legality of their own acts. This may not be done. (See Miller v. Pate, 386 U.S. 1 (1967).

Perhaps worst of all the attempt to submit now these memoranda "under a bond of confidentiality" is not only a denial of due process to petitioner but an astonishing attempt to impose an administrative gag order on this very Court.

It is, therefore, respectfully submitted that to vindicate the independence and integrity of this Court as well as to afford petitioner the due process to which he is entitled, that the Court furnish copies of the memoranda submitted to petitioner or order that the United States Attorney furnish such copies and that the relief requested in petitioner's pending motion in all respects be granted.

Respectfully yours,

Lloyd A. Hale

LAH:lc
cc. Alan Levine
Assistant United States
Attorney

United States Department of Justice

ADDRESS REPLY TO "UNITED STATES ATTORNEY" AND REFER TO INITIALS AND NUMBER:

AL:dag

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
ONE ST. ANDREW'S PLAZA
NEW YORK, NEW YORK 10007

July 2, 1976

Lloyd Hale, Esq.
36 West 44th Street
New York, New York

Re: Milton Silverman v. United States
75 Civ. 4989

Dear Mr. Hale:

This is to advise you that in connection with the Government's reply to the petitioner's motion for reargument the Government submitted under a bond of confidentiality for the Court's in camera inspection the submission of Andrew Maloney to the Department of Justice dated March 11, 1969 and a memorandum of the Assistant Attorney General dated March 12, 1969.

The submission of these documents in camera is not to be construed in any way as a change from the Government's position that petitioner is not entitled to the documents and that petitioner's remedy for that denial is the procedures incorporated into the Freedom of Information Act.

The Government merely provided these documents to the Court for the purpose of expediting a final resolution of this matter.

Very truly yours,

ROBERT B. FISKE, JR.
United States Attorney

By: Alan Levine BS
ALAN LEVINE
Assistant United States Attorney

cc: Honorable Edmund L. Palmieri
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

AL:rs

June 16, 1976

Honorable Edmund L. Palmieri
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Milton Silverman v. United States
75 Civ. 4989

Dear Judge Palmieri:

With the Court's permission the Government will file its reply to the petitioner Silverman's motion for reargument on June 25, 1976.

Very truly yours,

ROBERT B. FISKE, JR.
United States Attorney

By: _____
ALAN LEVINE
Assistant United States Attorney
Tel: 791-0932

CC: Lloyd Hale, Esq.
36 West 44th Street
New York, N.Y. 10036

United States Department of Justice

ADDRESS REPLY TO "UNITED STATES ATTORNEY" AND REFER TO INITIALS AND NUMBER
AL:ik

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE Annex
FOLEY SQUARE One St. Andrew's Plaza
NEW YORK, N. Y. 10007

February 26, 1976

Lloyd A. Hale, Esq.
36 West 44th Street
New York, New York 10036

Re: Silverman v. United States

Dear Mr. Hale:

This is to confirm out telephone conversation of February 26, 1976 in which I advised you that further inquiry of our records indicates that the files you inspected during 1975 with Frank H. Wohl, Assistant United States Attorney, are the same files which have been presented to me by our Record Clerk.

Therefore, there appears to be no reason for any further inspection.

Very truly yours,

THOMAS J. CAHILL
United States Attorney

By: _____
ALAN LEVINE
Assistant United States Attorney
Telephone: (212) 791-1934

cc: Hon. Edmund L. Palmieri
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

United States Department of Justice

ADDRESS REPLY TO "UNITED STATES ATTORNEY" AND REFER TO INITIALS AND NUMBER
AL:ik

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE Annex
FOLEY SQUARE One St. Andrew's Plaza
NEW YORK, N. Y. 10007

February 20, 1976

Lloyd Hale, Esq.
36 West 44th Street
New York, New York

Re: Milton Silverman v. United States

Dear Mr. Hale:

This is to confirm our conversation of yesterday in which the Government agreed to your request for an additional two weeks until March 8, 1976 to file reply papers in the above-entitled action.

Please be advised that this is the last adjournment to which the Government will consent.

Very truly yours,

THOMAS J. CAHILL
United States Attorney

By: Allan Levine
ALAN LEVINE
Assistant United States Attorney
Telephone: (212) 791-1934

cc: Honorable Edmund L. Palmieri
United States District Judge, SDNY
United States Courthouse
Foley Square
New York, New York 10007
(By Hand)

Lloyd A. Hale, Esq.
36 West 44th Street
New York, N.Y. 10036
972-0170

February 19, 1976

Office of the United States Attorney
Southern District of New York
Foley Square
New York, N.Y. 10007

Att: Alan Levine, Esq. Re: Silverman v. U.S.

Dear Mr. Levine:

This letter will confirm my telephone conversation with you of today in response to your letter of Feb. 10 received yesterday. My initial contact with your office concerning the production and inspection of records in the above matter was with the office of the chief of the criminal division in or about August, 1974, inasmuch as the matter was then unassigned. Eventually towards the end of 1976 Mr. Frank Wohl was so assigned (there may have been one or two assistants before Mr. Wohl, but nothing happened during their tenure). Eventually, during 1975, in at least two installments, several files were produced and examined by me in the United States Attorney's office. The purpose of this examination was, was stated to be, and is, to ascertain from the exhibits, the 3500 material, the Brady, and other exculpatory material, and the circumstances surrounding the alleged grant of immunity to Jacob Friedland, further support for and/or light on the Sec.2235 petition, which petition incorporates a motion for this relief. During the examination material which was confidential (difficult to conceive of at this date) or irrelevent was disregarded. After the examination I pointed out to Mr. Wohl that the files contained few of the trial exhibits, little 3500 or Brady material, and nothing on the alleged grant of immunity to Jacob Friedland, but did contain indicia that other material in at least the first three categories did exist. I do not believe I have had the privilege of conferring with the Mr. John Kenney, whom you mention.

After the above petition was filed and assigned to yourself we had a lengthy conference in which I summarized the foregoing circumstances and requested the remaining material, which request presumably resulted in the production of the fifteen additional files you mention in your letter of Feb. 10.

Entreaty is hereby made that examination of the newly found batch of files continue in the same manner as before and in sufficient time as to allow the filing of petitioner's reply herein by the adjourned date of March 9, 1976.

Thank you for your anticipated cooperation.

Yours truly,

cc: Honorable Edmund L. Palmieri
United States District Judge

United States Department of Justice

ADDRESS REPLY TO "UNITED STATES ATTORNEY" AND REFER TO INITIALS AND NUMBER

AL:emw

d-9

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

February 10, 1976

Lloyd Hale, Esq.
36 West 44th Street
New York, New York

Re: Milton Silverman v. United States

Dear Mr. Hale:

Fifteen additional file folders containing materials from the case of United States of America v. Silverman were produced in my office on February 6, 1976. I have reviewed the contents and none of the trial exhibits or 3500 material were contained therein, except Government's Exhibit 47 with which I assume you are familiar. I have directed that further search be conducted.

For the record, I would appreciate your identifying who in our office agreed to produce this material over a year ago. Mr. John Kenney, who had this matter prior to myself, denies ever making such a representation.

Very truly yours,

THOMAS J. CAHILL
United States Attorney

By: Alan Levine
ALAN LEVINE
Assistant United States Attorney
791-1934

cc: Honorable Edmund L. Palmieri
United States District Judge
United States Courthouse
Foley Square
New York, New York

LLOYD A. HALE
ATTORNEY AT LAW
36 WEST 44TH STREET
NEW YORK, N. Y. 10036
AREA CODE 212
TELEPHONE 972-0170

February 3, 1976

COPY

Hon. Thomas J. Cahill
United States Attorney
United States Court House
Foley Square, N.Y. 10007 Attn.: Alan Levine, Esq.

Re: Milton Silverman v. U.S.
75 Civ. 4000

Dear Mr. Levine:

This letter reflects your consent to setting February 23, 1976, as the date for filing petitioner's reply in the above matter.

Yours truly,

cc.: Hon. Edmund L. Palmieri
United States District Judge

United States Department of Justice

ADDRESS REPLY TO "UNITED STATES ATTORNEY" AND REFER TO INITIALS AND NUMBER

AL:jrs

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

January 23, 1976

Lloyd Hale, Esq.
36 West 44th Street
New York, NY 10036

Re: Milton Silverman v. United States
75 Civ. 4989

Dear Mr. Hale:

This is to confirm an adjournment of the return date for the Government's papers in opposition to the motion and the plaintiff's reply papers until February 9, 1976.

Very truly yours,

THOMAS J. CAHILL
United States Attorney

By: Alan Levine
ALAN LEVINE
Assistant United States Attorney

CC:
Honorable Edmund Palmieri
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

December 30, 1975

Lloyd A. Hale, Esq.
36 West 44th Street
New York, N.Y. 10036

Re: Milton Silverman v. United States
75 Civ. 4989

Dear Mr. Hale:

This is to confirm our telephone conversation today adjourning the due date of the Government's response to your petition to January 26, 1976.

Sincerely,

THOMAS J. CAHILL
United States Attorney

By: _____
ALAN LEVINE
Assistant United States Attorney

CC:
Honorable Edmund L. Palmieri
United States District Judge
Room 2003
Foley Square
New York, New York 10007

United States Department of Justice

ADDRESS REPLY TO "UNITED STATES ATTORNEY" AND REFER TO INITIALS AND NUMBER

AL:ik

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE Annex
~~FOLEY SQUARE~~ One St. Andrew's Plaza
NEW YORK, N. Y. 10007

November 4, 1975

Lloyd Hale, Esq.
Room 1106
36 West 44th Street
New York, New York 10036

Re: Milton Silverman v. United States
75 Civ. 4989

Dear Mr. Hale:

This is to confirm your consent to an extension of the Government's time for filing its response to the above-entitled action until December 15, 1975.

Very truly yours,

THOMAS J. CAHILL
United States Attorney

By: Alan Levine
Alan Levine
Assistant United States Attorney
Telephone: (212) 791-1934

cc: Honorable Edmund L. Palmieri
United States District Judge
Room 2003
United States Courthouse
Foley Square
New York, New York 10007